

DUTT
ON
CONTRACT

THE INDIAN CONTRACT ACT, 1872

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DUTT ON CONTRACT

THE INDIAN CONTRACT ACT, 1872

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THE INDIAN CONTRACT ACT, 1872

INTRODUCTION

General Rules of Interpretation

1. Statute.—“A statute”, observed Lord Dunedin, “is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable”.¹

The words of a statute must be construed *ut res magis valeat quam pereat* (i.e., it is better for a thing to have effect than to be made void).²

In interpreting a statute the Court cannot ignore its aim and object.³

The main rule of construction is that a statute should be construed according to the intention of the legislature.⁴ The intention is to be ascertained from that which the legislature has chosen to enact either in express words or by reasonable and necessary implication.⁵ The function of the court is not to say what the legislature meant but that what it has said it meant.⁶ The court is not concerned with the reason or policy of an Act.⁷ Its duty is to see that the intention of the legislature is carried out.⁸ It is always dangerous to paraphrase an enactment.⁹ A statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.¹⁰ Where there are two provisions in an Act, the court should try to reconcile them.¹¹ Where the words are plain, the court shall expound them as they stand¹² and not regard the anomalies that may be pro-

1 *Whitney v. IRC*, (1926) AC 37, 52, *CIT, Delhi v. Teja Singh*, AIR 1959 SC 352, 356.

2 Maxwell on *Interpretation of Statutes*, 11th ed. p. 228. See also Craies on *Statute Law*, 5th ed., p. 90; *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107, 1113.

3 *New India Sugar Mills Ltd. v. CIT, Bihar*, AIR 1963 SC 1207, 1213.

4 *Commissioners &c v. Pemsel*, 1891 AC, 531, 543, 61 L J Q B 265, (1891-94) All ER Rep 28. 28.

5 *Salomon v. Salomon*, 1897 AC 32, 38; (1895-99) All ER Rep 33; *Nanak v. Mehin*, IA 487, 496.

6 *Young v. Hughes*, 4 H & N (83-4); *Lala Suraj v. Golab Chand*, ILR 27 Cal 724, 755; *Bishun v. Jagarnath*, ILR 22 Pat 148; *Municipal Board v. Radha*, 1949 A 301.

7 *Pratap v. Gulzari*, 1942 A 50 FB.

8 *Emp. v. Ranchhod*, 1948 B 370 FB.

9 *Durga v. Jewahir*, 18 C 23, 30.

10 *Alangamanjori v. Sonamoni*, 8 C 637; *Swaminatha v. Vaidyanatha*, 28 M 466, 15 MLJ 116 FB; *Mohar v. Queen Empress*, 21 C 392, 399-400.

11 *Nanalal v. B L Assurance*, 1949 B 562.

12 *Gureebullah v. Mohun*, 7 C 127; *Lala Suraj v. Golab*, 27 C 724, 756.

duced, unless there be compelling necessity.¹³ It must be assumed that the legislature makes no mistakes.¹⁴ The Act should be interpreted as a whole, every word should, in the first instance, be given its ordinary meaning.¹⁵ The practice of the court cannot justify a construction which is contrary to the working of the Act.¹⁶ Words cannot be read into a statute which are not there unless it is absolutely necessary to do so¹⁷ nor words used should be ignored.¹⁸ Statutes should, as far as possible, be construed so as to produce harmony and not discord.¹⁹ The court must help legislature to carry out its object.²⁰ The court is not concerned with the reason or policy of an Act, its duty is to give effect to the plain meaning of the section.²¹ The court cannot aid, amend, and by construction make up deficiencies in the phrases of an Act²² nor can the court change or repeal a law.²³

The court cannot allow itself to be influenced by the previous law²⁴ or by any general inferences to be drawn from the nature of the objects dealt with by the statute.²⁵ The object of codifying is that the law should be ascertained from the language of the Code and not from prior decisions.²⁶ The meaning of an Act should be gathered by a reference to the Act alone.²⁷ Where a Code is exhaustive, the court is not to disregard or go outside the letter of the enactment.²⁸ Amendments altering the language of a statute must be taken to have been deliberately made.²⁹ Where it is not exhaustive, or on points not specifically dealt with by it, the court must act according to equity, justice and good conscience consistently with the intention of the legislature.³⁰ The decision of a court should be governed by the Codes and not by extraneous considerations.³¹ One High Court should not differ from

13 *Promotho v. Kali*, 28 C 744, 747; *Rajib v. Lakhan*, 27 C 11, 15.

14 *Commissioners &c. v. Pemsel*, 1891 AC 531, (1891-94) All ER Rep 28.

15 *Pudmanund v. Hayes*, 28 C 733; *Harris v. Brown*, 28 C 621.

16 *Balkaran v. Gobind*, 12 A 129.

17 *Renule v. Manmatha*, 1945 PC 108.

18 *Corp. of Calcutta v. Province*, 1940 C 47.

19 *Arjun v. Krishna*, 21 Pat. 1.

20 *Cooper v. Shawa*, 1949 B 131.

21 *Pratap v. Gulzari*, 1942 A 50 FB.

22 *Gurdila v. Central Board*, 9 L 698.

23 *Sadananda v. Harinam*, 1950 C 179.

24 *Norendra v. Kamalabasini*, 25 C (571-2); *Adm. Genl. v. Premlal*, 22 IA 107; 22 C 788, 797.

25 *Nanak v. Mehin*, 1 A 487, 497.

26 *Norendra v. Kamalabasini*, 23 C (571); *Lala Suraj v. Golab*, 28 C 517; 5 CWN 640; *Sarat v. Emperor*, 7 CWN 301; *Irrawaddy Flotilla Co. v. Bugwandas*, 18 C 620.

27 *Gureebullah v. Mohun*, 7 C 127.

28 *Gokul v. Pudmanund*, 29 C 707, 715.

29 *Fraser v. Minister of National Revenue*, 1949 PC 120.

30 *Hukum v. Kamalanand*, 33 C 927, 931, 948; 3 CLJ 67, 71; *Rasik v. Bidhumukhi*, 33 C (1098); *Abdul v. Shahana*, 58 IC 748, I. Lah, 339; see *Irrawaddy Flotilla Co. v. Bugwandas*, 18 C (629).

31 *Balkaran v. Gobind*, 12 A 129 FB.

the decision of another on an all-India statute unless there is an overriding reason.³² The plain language of a statute cannot be overridden by a court by reference to its spirit unless the argument is convincing.³³ In construing an Act, no reference can be made to the antecedent debates or to subsequent statements of opinion, or to the Report of the Select Committee.³⁴ Acts which have the effect of impairing contracts and affect vested rights must be strictly construed.³⁵ Statutes are not to have retrospective operation unless they contain express words to that effect.³⁶ "The law as it existed when the action was commenced must decide the rights of the parties unless the legislature expresses a clear intention to vary the relation of the litigant parties to each other".³⁷ Where it is possible to construe the words of the legislature in more than one way, the courts will always lean against an interpretation which will give retrospective effect to the terms of an enactment.³⁸ Reference to repealed provisions for interpretation of what has been enacted in their place is sometimes permissible.³⁹

The positive language of an Indian enactment precludes the application in India of the principles of English law.⁴⁰ No statute is to be construed to take away any private right of property unless such an interpretation appears by express words or by necessary implication.⁴¹ Previous state of the law may be considered when the amending statute is not clear.⁴² Jurisdiction of superior courts is not to be excluded except by clear words.⁴³

2. The Section.—Where the terms of a section are plain, the court should expound it as it stands,⁴⁴ unless the court finds either in the section itself or in any other part of the statute anything that will modify or qualify or alter the language.⁴⁵ If the plain interpretation results in anomalies the court may give effect to the intention of the legislature.⁴⁶ The court should, however, try to avoid a construction which will lead to manifest absurdity or inconvenience, and of two possible constructions it should adopt that which it is more reasonable

32 *Dady v. Commissioners of Income Tax*, 1948 B 46; *Re Sarupachand* 1945 B 258.

33 *Mohadev v. Chairman &c.*, 11 CLJ 524; *All-India &c. v. Ram*, 1939 N 179.

34 *Dina v. Raja Sati*, 36 CLJ 220, 27 CWN (120-1); *Adm. Genl. v. Premlal*, 22 C (799) PC; *Queen Empress v. Sri Churn*, 22 C (1022); *Queen Empress v. Bal Gangadhar* 22 B (127); *Krishna v. Nellaperumal*, 47 I. A 33, 43 M (559); but see *Assan v. Pathumma*, 22 M 494, 504; *Mahalakshmi v. Shamrangini*, 41 C 673.

35 *Lalchand v. Nandu*, 1948 N 139.

36 *Marsh v. Higgins*, 19 LJCP 297; *Nepra v. Sayer*, 55 C 67; but see *Dila v. Alina*, 1949 A 225.

37 *Durgapada v. Nrisingha*, 159 IC 20.

38 *Shantiniketan Co-operative Society v. Madhavlal*, 37 Bom LR 955.

39 *Bereng v. King*, 1949 PC 172.

40 *Mulraj v. Vishwanath*, 40 IA 24, 30; *Abdur v. Mahomed*, 5 C (527).

41 *Umacharan v. Ajadannissa*, 12 C 430, 433; *Chudaman v. Kamta*, 1939, N (230).

42 *Abdur v. Mahomed*, 5 C 519, 527.

43 *Kavasji v. Rustomji*, 1949 B 42.

44 *Gureebullah v. Mohun*, 7 C 127.

45 *Rajib v. Lakhan*, 27 C (15); *Wilkinson v. Wilkinson*, 47 B (897); *Nanak v. Mehin*, IA 487.

46 *Madho v. Mahan*, 1939 A 328.

to suppose the legislature intended.⁴⁷ In order to avoid a conflict between two sections, the language of one may be interpreted or modified by that of the other.⁴⁸ When a section contains two provisions inconsistent with each other the second shall prevail.⁴⁹ Effect should be given to all the words of a section.⁵⁰ The court cannot put into a section words which are not there.⁵¹ The section should not be construed without the proviso.⁵²

"Now anyone", said Jessel M. R., "who contends that a section of an Act of Parliament is not to be read literally must be able to show one of two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act".⁵³

Lord Greene, M. R. in a later case⁵⁴ made the following pertinent observation:

"The method of construing statutes that I myself prefer is not to take out particular words and attribute to them a sort of *prima facie* meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question: "In this statute, in this context, relating to this subject-matter, what is the true meaning of that word?"

An interpretation suggesting that the language of a section of an enactment is not strictly accurate is not permissible.⁵⁵

3. **The Heading of a Chapter.**—The heading is a help to the construction of an Act where the sections are ambiguously worded.⁵⁶ It may be used to extend the meaning of a section which follows,⁵⁷ but not to restrict it.⁵⁸ A heading to one group of sections cannot alter the meaning of a section outside the group, and cannot be used to interpret another group of sections.⁵⁹

4. **Words of a Statute.**—If the words of a section are plain, then no more can be necessary than to expound them in their natural and ordinary sense,⁶⁰ and in the absence of overwhelming reason they cannot be made to stand for other words with a different meaning.⁶¹ The court is not ordinarily justified in adding to or taking out words.⁶² The grammatical sense of the word used should be followed unless it be inconsistent with any expressed intention or

47 *Haji Abdul Khoja Khaki*, 11 B (24).

48 *Mada v. Puvvada*, 1939 M 361 FB.

49 *King v. Dominion Engineering Co.*, 1947 PC 94.

50 *Sat v. Shati*, 1949 EPIFB.

51 *Umachurn v. Ajaddanissa*, 12 C 430.

52 *Gangamoyee v. Manindra*, 1950 C 225.

53 *Nuth v. Tamplin*, (1881) 8 QBD 247, 253 CA.

54 *In re Bidie deceased*, (1949) Ch 121, 129 CA.

55 *Avtar Singh v. State of Punjab*, AIR 1965 SC 666, 668.

56 *Re Shivalal*, 34 B 316.

57 *Janki v. Jagarnath*, 1917 Pat HC 318, 322.

58 *Re T. M. Bank*, 1950 C 240.

59 *Shelley v. L. C. C.*, (1949) AC 56, 69, (1891-94) All ER Rep 28. See also *Bhinka v. Charan Singh*, AIR 1959 SC 960.

60 *Commissioner &c. v. Pemsel*, 1891 AC (548); *Re Sewnaram*, 21 C 911; *Krishna v. Nallaperumal*, 47 IA 38; 43 M (565); *Queen Empress v. Abdulla*, 7 A 385, 398 FB.

61 *Dy. Commissioner v. Kallu*, 1147 O 195.

62 *Tafazzal v. Shah*, 1949 A 261.

leads to an absurdity or contradiction, when it can be modified, extended or abridged, so as to avoid the same,⁶³ but not simply on the ground of inconvenience.⁶⁴ The words are to be construed, therefore, in such a manner as to further and not to defeat the purpose of the Act.⁶⁵ The same expression used in the same section is to be given the same meaning.⁶⁶ A word should be interpreted in the same sense throughout the Act, unless the context in any particular section requires that it should be understood in a different sense.⁶⁷ When a word has more than one meaning, the best criterion for determining its precise meaning is to be found in the context in which it is used.⁶⁸ Words cannot be construed in a different sense from their ordinary meaning in order to avoid superfluity.⁶⁹ General words must be construed as taking their meaning from the specific words which precede them.⁷⁰ Words should be construed in the sense in which they have previously been construed by the court and adopted by the legislature on other statutes, even though that sense may vary from their strict literal meanings.⁷¹ When the main object or intention of a statute is clear, the draftsman's want of skill shall not reduce it to a nullity, except in the case of absolute intractability of the language used.⁷² It is not always safe to interpret a particular statute with reference to the provisions contained in another statute.⁷³ The Statement of Objects and Reasons of a Bill cannot be used for interpreting legislation, but can be referred to for ascertaining the circumstances which led to the legislation to find out the mischief aimed at.⁷⁴ Nor can such Statement of Objects and Reasons be used to determine the true meaning and effect of substantive provisions of a statute.⁷⁵

5. **The Preamble.**—It is the key to open the minds of the makers of the Acts and the mischiefs which they are intended to redress. Recourse may be had to it when the words of a statute are ambiguous,⁷⁶ but not when the words

63 *Promotho v. Kali*, 28 C 744, 748; *Arjun v. Krishna*, 21 Pat 1 FB; *Kunwar Sheo*, 1950 A 327.

64 *Shrinath v. Puran*, 1942 A 19 FB.

65 *Molla Ataul v. Chairman &c.*, 24 CWN 969; 57 IC 960.

66 *Ram v. Anadi*, 58 A (966) FB; *Narsing v. Chogemull*, 1939 C 435.

67 *Queen Empress v. Nagla*, 22 B 235, 238; *Re Baba Yeshwant*, 35 B 401; *Kanniappa v. Secretary of State*, 59 M 107.

68 *Secretary of State v. Khan Chand*, 16 Lah 280.

69 *Ranchoddas v. Nathmal*, 1949 B 356.

70 *Ramdoyal v. Sheodayal*, 1939 N 186.

71 *Ruskmaboye v. Lulloobhoy*, 5 MIA 234; *Le Mesurier v. Wajid*, 29 C 890, 905-6; *Re Trader's Bank*, 1949 L 48.

72 *Maung Ba v. M. S. Chettyar*, AIR 1935 Rang 460; *Narsing v. Chogemull*, 1939 C 435.

73 *Kameswar v. Kulada*, 40 CWN 153.

74 *S. C. Parashar v. Vasantsen*. AIR 1963 SC 1316.

75 *State of West Bengal v. Union of India*, AIR 1963 SC 1241.

76 *Commissioners &c. v. Pemsel*, 1891 AC 531: (1891-94) All ER Rep 28; *Sital v. Delannoy*, 20 CWN (1163); *Bhola v. Emperor*, 199 IC 322; *Aswini Kumar v. Arabinda*, AIR 1952 SC 369; *Harishankar v. State of M.P.*, AIR 1954 SC 465; *In re Kerala Education Bill*, 1957 AIR 1958 SC 956; *Burrakur Coal Co. v. Union of India*, AIR 1961 SC 954; *Motipur Zemindary Co. v. State of Bihar*, AIR 1962 SC 860.

are clear.⁷⁷ It is permissible to refer to the Preamble to confine the Act within its real scope.⁷⁸ It cannot restrict or extend the scope of the sections.⁷⁹ It is not conclusive on a question of *vires*.⁸⁰

6. **Marginal Notes.**—These cannot be referred to for the purpose of construing an Act⁸¹ when the words are free from ambiguity.⁸² They do not form part of the statute.⁸³ But it has been said that they may be looked at in order to find out the general trend of the sections,⁸⁴ or to clear up their ambiguity.⁸⁵

7. **Illustrations.**—They ought not to be allowed to control the plain meaning of the section itself, specially when the effect would be to curtail a right which the section in its ordinary sense would confer,⁸⁶ but they have been held to be of relevance and value in the construction of the text, and the courts are not likely to reject them on the ground of their supposed repugnancy to the section themselves.⁸⁷ They do not limit the generality of the section to which they are appended.⁸⁸

8. **Definition: Interpretation clause.**—Its effect is to give the meaning assigned by the Act to the word interpreted in all places of the Act and not to annex to it every incident which may seem attached to it by any other Act.⁸⁹ In interpreting one Act definitions given in other Acts cannot be applied.⁹⁰ The definition given in an Act must be substituted for the word defined wherever it occurs in the Act.⁹¹ All statutory definitions or abbreviations must be read

77 *Queen Empress v. Indrajit*, 11 A (266); *Nepra v. Sajer*, 103 IC 662; *Maung Ba v. M. S. Chettyar*, 13 R 156; *Raj Mal v. Harnam*, 9 Lah (698).

78 *Tarquand v. Board of Trade*, 11 AC 286; (1886-90) All ER Rep 567; See *Re Ishan*, 6 C 707; *Roberts v. Harrison*, 7 C (336).

79 *Savitri v. Dwarka*, 1939 A 305.

80 *Rex v. Basudeva*, 1950 FC 69.

81 *Brijlal v. Jagatpal*, 26 A 393, 406; 8 CWN 699, 706; *Re Vinayak*, 24 B 120; *Maung Ba v. M. S. Chettyar*, 159 IC 1060; *Dharwar Urban Bank v. Krishnarao*, 39 Bom LR 203; *Claydon v. Green*, LR 3 CP 511; *C.I.T. v. Ahmedbhai Umerbhai*, AIR 1950 SC 134; *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661; *W. I. Theatres v. Municipal Corporation, Poona*, AIR 1959 SC 586; *Haridas Mundra v. N. & G. Bank Ltd.*, AIR 1963 Cal 132.

82 *Srinath v. Sudai*, 1940 M 8.

83 *Sutton v. Sutton*, 22 Ch D 511, *refd. to in Punardeo v. Ram Sarup*, 25 C (862); *Re Ratanji*, 1941 B 397.

84 *Secretary of State v. Municipal Corporation*, 59 B 681; *Ram v. Bhagwat*, 51 A 411, 424.

85 *Emp. v. Fula*, 1940 B 363.

86 *Koylash v. Sonatun*, 7 C 132, 135; *B. N. Ry. Co. v. Ratanji*, (1928) 2 Cal 72 PC; *Balaji v. Chakka*, 9 IC 143.

87 *Mulraj v. Vishwanath*, 40 IA (30); *Mahomed v. Yeoh*, 43 IA (263); 39 IC (401) cited in *Satis v. Ram*, 32 CLJ 94, 24 CWN 982; *Muralidhar v. I. Film Co.*, 1934 PC 34; *Jamma Masjid v. Kodi*, AIR 1962 SC 847; *Sopher v. Adm. General of Bengal*, (1944) 71 IA 93.

88 *Chettyar Firm v. Sein Htaung*, 159 IC 1038; *Shambhunath v. State of Ajmere*, AIR 1956 SC 404.

89 *Umachuran v. Ajadannisga*, 12 C 430, 433; *Queen Empress v. Ram Lal*, 15 A (143).

90 *Jainarain v. Motiram*, 1949 N 34.

91 *Jagat v. P. of Bombay*, 1950 B 144.

subject to the qualification, variously expressed, in the definition clauses which create them.⁹²

9. **Proviso.**—It may be used as a guide to the solution of one of two possible constructions of the words of a statute.⁹³ Provisions not contained in the enacting portion of a statute cannot be inferred from a proviso.⁹⁴ A proviso merely carves out an exception to the main provision to which it has been enacted as a proviso.⁹⁵ A proviso may be construed in the light of the section, but not a section in the light of a proviso.⁹⁶ A proviso is to be construed harmoniously with the main enactment.⁹⁷

10. **Punctuation.**—Punctuation is no part of the statute and a court in interpreting a section may disregard the punctuation.⁹⁸ "Punctuation is, after all, a minor element in the construction of a statute, and very little attention is paid to it by English Courts. Cockburn C.J. said in *Stephenson v. Taylor*, (1861) 1 B. & S. 101: 'On the Parliament Roll there is no punctuation and we, therefore, are not bound by that in the printed copies'. It seems, however, that in the Vellum copies printed since 1850 there are some cases of punctuation, and when they occur they can be looked upon as a sort of *contemporanea expositio*, see Craies on *Statute Law*. When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given to the punctuation, *vide* Crawford on *Statutory Construction*. I need not deny that punctuation may have its uses in some cases, but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text".⁹⁹

The better rule is that punctuation is a part of the Act and that it may be considered in the interpretation of the Act, but may not be used to create doubt or to distort or defeat the intention of the legislature. When the intent is uncertain, punctuation, if it affords some indication of the true intention, may be looked to as an aid. In such a case the punctuation may be disregarded, transposed, or the Act may be re-punctuated if the Act as originally punctuated does not reflect the true legislative purpose. An Act should be read as punctuated unless there is some reason to the contrary, and this is specially true where a statute has been repeatedly re-enacted with the same punctuation.¹

11. **Explanation.**—The construction of an explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be

92 Craies on *Statute Law*, 5th ed., p. 95.

93 *Mokadeb v. Chairman & Co.*, 11 CLJ 524.

94 *Governor General v. Municipal Council*, 1949 PC 39.

95 *Ram Narain v. Asstt. Comr.*, AIR 1955 SC 765; *M. S. M. Ry. Co. v. Bezvada Municipality*, 71 IA 13; *Toronto Corporation v. Att. Genl. for Canada*, (1946) AC 32.

96 *West Derby Union v. Metropolitan Life Assurance Co.*, (1897) AC 467, 652, 655.

97 *C.I.T. v. Indo-Mercantile Bank Ltd.*, AIR 1959 SC 713; *C.I.T. v. Ajax Products*, AIR 1965 SC 1358.

98 *Maharani of Burdwan v. Murtunjoy*, 14 IA 39, 35; *Pugh v. Ashutosh*, 8 Pat 516; *Niaz v. Parshotam*, 53 A 374; *Indian Cotton Co. v. Hari* 166 IC 974.

99 *Aswini Kumar v. Arabinda*, AIR 1952 SC 369, 383 (per B. K. Mukherjee J.).

1 *Sutherland on Statutory Construction*, 3rd ed., Vol. II, Art. 4939.

inferred from the language used.² An "explanation" must be interpreted according to its own tenor. It is an error to explain the explanation with the aid of the section to which it is annexed.³

The mere description of a certain provision, such as "Explanation", is not decisive of its true meaning. The interpretation must obviously depend on the words used therein, but this must be borne in mind that when the provision is capable of two interpretations, that should be adopted which fits the description.⁴

12. **Saving clause.**—The saving clause is generally used in repealing statutes in order to prevent them from affecting rights accrued, penalties incurred, duties imposed, or proceedings started under the statute sought to be repealed. Its position or verbal conflict is unimportant. But if it is in irreconcilable conflict with the body of the statute of which it is a part, it is ineffective or void.⁵

"A difference, indeed, has been said to exist in this respect between the effect of a saving clause, or exception, and a proviso in a statute. When the proviso appended to the enacting part is repugnant to it, it unquestionably repeals the enacting part, but it is said by Lord Coke that when the enactment and the saving clause (which reserves something which would be otherwise included in the words of the enacting part) are repugnant, the saving clause is to be rejected, because otherwise the enactment would have been made in vain".⁶

² *Krishna v. Nattiarperumal*, (1919) 47 IA 33.

³ *Burmah-Shell Oil Ltd. v. Commercial Tax Officer*, AIR 1961 SC 315.

⁴ *State of Bombay v. United Motors (India) Ltd.*, AIR 1953 SC 252.

⁵ *Crawford on Statutory Construction*, para 300.

⁶ *Maxwell on Interpretation of Statutes*, 11th ed. p. 153.

THE INDIAN CONTRACT ACT, 1872

ACT IX OF 1872

Whereas it is expedient to define and amend certain parts of the law relating to contracts, it is hereby enacted as follows:—

PRELIMINARY

1. Short title.—This Act may be called the Indian Contract Act, 1872.

Extent, Commencement.—It extends to the whole of India except the State of Jammu and Kashmir; and it shall come into force on the first day of September, 1872.

Enactments repealed.—Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

1. Scope of the Act.—The Contract Act is not exhaustive,² but so far as it goes, it is exhaustive and imperative.³ The Act is not retrospective in its operation.⁴ Previous to the passing of the Act, the law generally applied by the High Courts, subject to certain exceptions or qualifications, was the common

1 For the Statement of Objects and Reasons for the Bill see Gazette of India, 1867, Extraordinary, p. 34; for the Report of the Select Committee, see *ibid*, Extraordinary, dated 28th March, 1872; for discussions in Council, see *ibid*, 1867, Supplement, p. 1064; *ibid*, 1871, p. 313, and *ibid*., 1872, p. 527.

The chapters and sections of the Transfer of Property Act, 1882 (IV of 1882), now Act XX of 1929, which relate to contracts are, in places in which that Act is in force, to be taken as part of this Act—see Act IV of 1882, s. 4. This Act has been extended to the new provinces and merged States by the Merged State Laws Act (LIX of 1949) and to the States of Tripura, Vindhya Pradesh and Manipur by the Union Territories Laws Act (XXX of 1950).

It had also been extended to the States merged in the States of Bombay and Punjab by Bombay Act 4 of 1950 and Punjab Act 5 of 1950 respectively.

The Act had been amended in C. P. by C. P. Act I of 1915 and in C. P., & Berar by C. P. & Berar Act 15 of 1938.

2 *Jwala v. Bansilal*, 31 Bom LR 687, 695 PC; *Ganpat v. Campbell & Co.*, 32 Bom LR 1836; *Gajanan v. Moreswar*, 44 Bom LR 703; *Nareschandra v. Ramchandra*, 55 CWN 765; *Kanhaiyalal v. Dineshchandra*, AIR 1959 MP 234; *P. N. Bank Ltd. v. Arura Mal*, AIR 1960 Punj 632.

3 *Irrawaddy Flotilla Co. v. Bhagwandas*, LR 18 IA 121.

4 *Onda v. Brojendra*, 12 BLR 451, 458, 472.

law of England. But by Statute 21 Geo. III c. 70, s. 17 laws and usages prevailing among Hindus and Muslims relating to succession and contract were made applicable and they are still in operation where the Act is silent.⁵

The principles of the Act apply to transfers. Indeed s. 5 of the Transfer of Property Act provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act.⁶

2. **Extent of application of the Act.**—The second paragraph of sec. 1 says in the most general terms that it extends to the whole of India except the State of Jammu and Kashmir. Paragraph three, however, saves statutes, Acts etc. not expressly repealed and usages and customs.

3. **Usages, etc. saved.**—Usages which are tacitly imported by the parties into their contracts are expressly saved from the operation of the Act.⁷ Where an agent has by custom the right to sell goods, it is not necessary to consider the application of any section of the Act to determine the question of his authority.⁸ By mercantile usage prevailing in Delhi market among big merchants no interest can be charged on unpaid price for transactions before 1917.⁹ The words “not inconsistent with the provisions of the Act” qualify “any incident of any contract” and not the earlier expression “usage or custom of trade”.¹⁰ See S. 9, notes 3-4.

4. **Acts or Regulations not repealed.**—The Act does not affect the following enactments bearing on the law of contract:—

Interest Act, 32 of 1839; Usury Laws Repeal Act, 28 of 1855; Bill of Lading Act, 9 of 1856; Artificers Act, 13 of 1859; Merchant Shipping Acts; Carriers Act 3 of 1865.

5. **The Law by which contracts involving foreign elements are governed.**—The law which the Court is to apply where parties to a contract are domiciled in different countries or where the contract is to be performed in a country other than the country in which it is made or in which the subject-matter of the contract is situate is known as “the proper law of the contract”.¹¹ The law which governs a contract depends upon the intention of the parties, express or implied.¹² When the intention is expressed in words, the expressed intention *prima facie* determines the proper law of the contract, but when not so expressed, the intention of the parties is to be ascertained on a consideration of diverse matters, such as the terms of the contract, the situation of the parties and surrounding facts. The Court will not necessarily regard the choice by parties as being the main consideration where a system of law is chosen which has no

5 *Russick v. Lokenath*, 5 C 688.

6 *Gauri v. Bandhu*, 119 IC 505.

7 *Irrawaddy Flotilla Co. v. Bugwandas*, 18 IA 121; *Raje v. Purnamal*, 98 IC 759; for an illustration see *Raghu v. Nanne*, 1933 L 127; *Hindu Mercantile Corporation Ltd. v. Miryala*, AIR 1959 AP 545; *Se Se Oil v. Gorakhram*, (1962) 64 Bom LR 113.

8 *Saligram v. Nathamal*, 145 IC 188.

9 *Raghu v. Nanne*, 1933 L 127.

10 *Irrawaddy Flotilla Co. v. Bugwandas*, 18 IA 121.

11 *Mount Albert v. Australasian Temperance*, (1938) AC 224.

12 *Bank of Travancore v. Dhrit Ram*, (1941) 69 IA 1.

real or substantial connection with the contract looked on as a whole.¹³ If the courts of a particular country are chosen, it is expected, unless there be either expressed intention or evidence, that they would apply their own law to the case.¹⁴

2. Interpretation clause.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise:
- (c) The person making the proposal is called the “promisor”, and the person accepting the proposal is called the “promisee”:
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement:
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:
- (g) An agreement not enforceable by law is said to be void:
- (h) An agreement enforceable by law is a contract:
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

1. The Section.—The section sets out the various elements which go to make a contract and in this analysis the traditional English method has been adopted.¹⁵ According to that law a contract springs from an offer and an acceptance of that offer. What is known as an offer in English law is called a proposal in this Act.

2. Proposal.—When I offer anything to a person, what I mean is “I will do that if you choose to assent to it”.¹⁶ Care should be taken to ascertain

¹³ *Re Helbert Wagg & Co. Ltd.*, (1956) 1 All ER 129; (1956) Ch 323; 100 Sol. Jo. 53.

¹⁴ *Dhanrajmal v. Shamji*, AIR 1961 SC 1285.

¹⁵ See *Satyadeva v. Tribeni*, 161 IC 579.

¹⁶ *Maynoll v. Surtees*, (1855) 25 LJ Ch 257, 259.

whether a seeming proposal is in reality a proposal. Thus, where A telegraphed, "Will you sell us B. H. P.? Telegraph lowest cash price", B wired back, "Lowest price for B. H. P. £900", and A then telegraphed, "We agree to buy B.H.P. for £900 asked by you", it was held that there was no contract. The second telegram was not a proposal but only an answer to a question asked. A's telegram in reply could not be regarded as an acceptance of the proposal to sell, but was an offer that was required to be accepted by B.¹⁷ Similarly, where in reply to a telegram from a broker, "Have likely purchaser your three properties. Telegraph lowest price for each", the owner sent the particulars and was informed that earnest money for one has been accepted by the broker, *held*, there was no concluded contract.¹⁸ Where, however, the municipal corporation of Bombay wished to acquire property of the defendant company and in the course of the negotiations the defendant company intimated that they were willing to accept without prejudice the sum offered, *held*, there was a contract.¹⁹ Where in course of a negotiation for sale the vendor wrote: "For a quick sale I would accept £26,000" and the purchaser replied: "I accept your offer". *Held*, there was a contract.²⁰ In *Markandela v. Sitambhar*¹ an invitation for offer was mistaken for offer, the so-called acceptance was in reality a counter-offer. A letter of a bank with quotations has been held to be not an offer.² A mutual expression of intention may give rise only to an expectation on each side without creating a contract capable of producing a legal result.³ A statement by the father of a girl to a young man that his daughter would have a share of what he left after the death of his wife was not a proposal which could be turned into a contract by acceptance by marriage. Even if it did amount to a contract, it would not imply a promise to give a share equal to that of the other beneficiaries.⁴ In a case where an expectation was raised that land and jewels would be conferred in consideration of a person residing with the donor, *held*, no concluded contract resulted by a person accepting the offer, as such acceptance only meant that the donor's intentions would remain unaltered.⁵ Where plaintiffs, *pakka adatis* from Bombay, wrote to the defendants at Ghaziabad stating the terms on which they were willing to do business, the letter was simply an intimation as to the terms on which they were prepared to do business, no contract of any sort arose between the parties.⁶

A unilateral decision of a bank to enhance the rate of interest notified by its circular could not be said to be a "proposal".⁷

17 *Harvey v. Facey*, 1893 AC 552; *Macpherson v. Appanna*, AIR 1951 SC 184, 186.

18 *Handandass v. Mohori*, 8 IC 601; *Surendra v. Kedar*, 63 CLJ 86.

19 *Fort Press Co. v. Municipal Corporation, Bombay*, 44 B 797.

20 *Bigg v. Royal Gibbins Ltd.*, [1971]2 All ER 183.

1 1943 N 81.

2 *State A. B. v. Dhrit*, 1942 PC 6.

3 *Narain v. Ramanuj*, 20 A 209 PC; *Rai Promatha v. Gostha*, 55 CLJ 46.

4 *Farina v. Fickus*, (1900)1 Ch 331; 69 LJ Ch 161; 81 LT 749.

5 *Venkata v. Lakshmi*, 5 IC 102; *Ch. Maddison v. Alderson*, 8 AC 467; (1881-85) All ER Rep 742.

6 *Devidatt v. Shriram*, 56 B 324, 334.

7 *Hulas Kunwar v. Allahabad Bank Ltd.*, AIR 1958 Cal 344.

A tender notice is only an invitation extended to contractors for making offers. It does not amount to an offer or proposal and the quotation of rates made by the contractor does not amount to an acceptance of offer.⁸

An advertisement for tenders is not a proposal which binds a party to sell to the person who makes the highest tender, but is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt. The advertisement, therefore, invites a proposal and does not make it,⁹ hence the acceptance of a tender may be qualified by conditions.¹⁰ A catalogue of goods for sale is not a series of offers but only an invitation for offers, and willingness to consider offers.¹¹ An offer must be distinguished from a mere invitation to treat.¹² Where plaintiffs from L asked for quotations of salt and the defendants fully stated their terms, then the plaintiffs wired for one wagon of salt; the wire constituted the proposal, the request for quotations being an invitation for offers.¹³ A quotation, therefore, is not capable of being turned into a contract by acceptance.¹⁴ An advertisement for the sale of goods by auction is a mere declaration and does not amount to a contract with anyone who may act upon it.¹⁵ The opening of a shop is a mere invitation to the public to come into that shop. It is voluntary and without consideration. Apart from special legislation, it is open to a shopkeeper at any time to refuse to deal with any member of the public, it is not necessary for the shopkeeper to give any reasons for his refusal.¹⁶ When one is dealing with advertisements and circulars, unless they come from manufacturers, they are to be construed as invitations to treat and not offers for sale.¹⁷ If a shopkeeper advertises goods at a certain price, a customer has no right to demand the article at the price marked. No sale is effected if a customer on entering a self-service shop selects the articles he requires and puts them in the basket.¹⁸ Letters passed between parties may not constitute a completed contract but be merely evidence of negotiations between the parties.¹⁹ Where the plaintiff acted upon a statement made by the defendant in the course of his evidence in Court, the Privy Council refused to hold that the acceptance of the proposal resulted in contract.²⁰ Where a firm of solicitors wrote to a company of property developers placing on record "the understanding that all the legal work incidental to the completion of the

8 *N. P. Singh v. Forest Officer*, AIR 1962 Manipur 47.

9 *Spencer v. Harding*, LR 5 CP 561; see *Rooke v. Dawson*, (1895) 1 Ch 480; see Halsbury's *Laws of England*, 4th ed. vol. 9, para 230.

10 *Kundan v. Secretary of State*, 1930 O 249.

11 *Thanawala v. Basudeo*, 1 IC 325.

12 Halsbury's *Laws of England*, 4th ed. vol. 9 paras 227, 228.

13 *Durga v. Rulia*, 65 IC 282; *Shyamsundar v. Abdul*, 173 IC 943.

14 *Shyamsundar v. Abdul*, 173 IC 943 foling *Devidatt v. Shriram*, 56 B 324; see *Ara v. Dy. Commissioner*, 1941 O 529.

15 *Harris v. Nickerson*, LR 8 QB 286.

16 *Trevellion v. Minck*, 32 ALJ 43.

17 *Partridge v. Gittenden*, (1968) 2 All ER 421, 424.

18 *Pharmaceutical Society of Great Britain v. Boots Cash Chemicals*, (1952) 2 All ER 456, affd. (1953) 1 All ER 482.

19 *Punjab N. Bank v. Arora*, 149 IC 1124.

20 *Pannaji v. Kapurji*, 162 IC 327 PC.

development" would be carried on by the firm, held no binding contract was created.¹

The terms of a proposal may be so vague as to prevent the formation of a contract. A promise to leave something more by will, "but what further amount I cannot say", does not create a binding contract to give more.² As has been observed: "To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when the parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises". Thus, where parties agree to walk together or where there is an offer and an acceptance of hospitality, or where husbands agree to pay allowances to wives, the transactions do not result in contracts because the parties do not intend that they should be attended by legal consequences, though there might be mutual promises and even consideration.³ "If the intention may be negatived impliedly it may be negatived expressly".⁴ A contract can only arise if there is the *animus contrahendi* between the parties.⁵ If the owner of a property, in reply to a query by a customer as to whether the property will be sold and as to its lowest price, states the lower price and the customer agrees to buy the property for that price, it cannot be said that an enforceable contract has come into existence.⁶ If the owner of a property writes to a prospective buyer, "I...am prepared to offer you...my...estate for £600,000....I also agree that a reasonable time shall be granted....for the examination...of all the data and details...for the preparation of the schedule of completion", the letter is not a definite offer to sell.⁷ When a question arises whether a contract has been made or not, it can only be determined either by proving that it was made in express terms, or that there is a necessary implication from the circumstances of the parties and the transactions generally that such a contract was made. If an essential term of a contract be not settled there can be no concluded contract but there would be one if the matter not settled was not a term of contract.⁸ A party cannot be held bound to something for

1 *J. H. Milner & Son v. Percy Bilton Ltd.*, (1966) 2 All ER 894.

2 *Moorehouse v. Colvin*, 15 Beav 341, see *Maddison v. Alderson*, 8 AC 467; (1881-85) All ER Rep 742; *Maunsell v. Hedges*, 4 HLC 1039; *Randall v. Morgan*, 12 Ves. 67; (1861-73) All ER Rep 937.

3 As in *Balfour v. Balfour*, (1918-19) All ER Rep 860; (1919) 2 KB 571; *Merritt v. Merritt*, [1970] 2 All ER 760 CA where an agreement by the husband to sell the matrimonial home to the wife was held binding on the husband; *Jones v. Padavatton*, [1969] 2 All ER 616 CA where arrangement between mother and daughter as to maintenance and occupation of a house held to be not a binding agreement; see 8 Halsbury's *Laws*, 3rd ed. pp. 54, 55 paras 90, 144, 197.

4 *Rose v. Crompton*, (1923) 2 KB 261, 293.

5 *Vandepitte v. Accident Insurance Co.*, 31 ALJ 373 PC.

6 *Harvey v. Facey*, (1893) AC 552.

7 *Clifton v. Patumbo*, (1944) 2 All ER 497. See also *Bigg v. Boyd Gibbins Ltd.*, [1971] 2 All ER 183, 185.

8 *Balfour v. Balfour*, (1919) 2 KB 571; *Deep v. Mohammad*, 1951 A 93 FB; *Courtney & Fairbairn Ltd. v. Talani*, [1975] 1 All ER 716 CA.

which he has not contracted.⁹ Thus, a person may become a policy-holder in an insurance company relying on the representation in the prospectus regarding the distribution of profits. That does not prevent the company from altering the distribution of profits, because there was no contract with the policy-holder that no alteration was to be effected.¹⁰ "There must be a contract in order to entitle a party to obtain relief".¹¹ Where a firm in response to a notice offered their tenders for the purchase of certain forest products and the tenders were accepted by the Chief Conservator but the firm failed to make, on the spot, the initial deposit of 25 p.c. of the purchase price, such deposition being the condition precedent to the acceptance of the tender, which the Conservator had no power to waive, the purported acceptance was invalid and there was no concluded contract.¹²

3. Sec. 2(b) Promise.—A proposal on acceptance is said to become a promise. But in English law a binding promise may arise without the communication of a proposal or of its acceptance by virtue of a contract under seal. Such a contract does not derive its validity from the fact of an agreement or from the presence of consideration but is binding because of the form (of a deed) alone, hence it is called a formal contract. It is good even against a party who has derived no advantage from it.¹³ A promisee is entitled to the benefit of a contract under this form without assent on his part.¹⁴ The English doctrine with its peculiar rules is not applicable in this country.¹⁵ Promises, however, do not result in contractual obligations where the option as to performance is vested in one of the contracting parties. Thus, a promise to pay a legacy in remuneration for work,¹⁶ or such remuneration as may be deemed right,¹⁷ or such sum of money as may be deemed right by the employer as compensation for work done,¹⁸ has been held not to create a contract. The doctrine of *quantum meruit*, however, has been applied in some of these cases,¹⁹ but relief on this basis must be claimed.²⁰ A promise is an accepted proposal; a person asking for a loan, undertaking at the same time to repay it with interest on a certain day, does not make a promise but only a proposal.¹ The technical use of the word 'promise' in the Act is far narrower than the popular use. Express words of promise are often in law no more than a proposal.

9 *Pratap v. Keshav*, 33 ALJ 242 PC.

10 *British E. Assce. Co. v. Baily*, 1906 AC 35: (1904-07) All ER Rep 592.

11 *Farina v. Fickus*, (1900) I Ch 331.

12 *State of M. P. v. Firm G. Dass*, AIR 1973 SC 1164.

13 *Pratt v. Barker*, 4 Russ 507.

14 *Siggers v. Evans*, 5 E & B 367.

15 But see S. 25 (1).

16 *Maddison v. Alderson*, 8 AC 467: (1881-85) All ER Rep 742; *Baxter v. Gray*, 3 Man & G 771.

17 *Taylor v. Brewer*, IM & S 290.

18 *Roberts v. Smith*, 28 LJ Ex 164.

19 *Jewry v. Bush*, 5 Taunt 302: 128 ER 108. *Bryant v. Flight*, 5 M & W 114: 151 ER 49; see *Sathiavel v. Sivasami*, 1933 M 844.●

20 *Sathiavel v. Sivasami*, 1933 M 344.

1 *Dhondbhat v. Atmaram*, 13 B 669, but see *Channamma v. Ayanna*, 16 M 283.

A proposal is merely an offer to be bound by a promise, while a promise in law is an accepted proposal.² A promise cannot be accepted by the filing of a plaint. In *Visweswaradas v. Narayan Singh*³ the defendant offered on Sept. 2, 1957 to assign a mining lease for Rs. 80,000 to the plaintiffs, who were given three months' time to make up their mind. On Oct. 31, 1957 the defendant posted a letter to the plaintiffs revoking the offer. This letter reached the plaintiffs on Nov. 6, 1957. On Nov. 1, 1957 the plaintiffs filed a suit for a declaration that they are entitled to remain in possession of the mining area. The suit was dismissed on the ground that there was no concluded contract. The Supreme Court held that the plaint in the suit was not an acceptance of the offer to assign the lease, because it is not usual to accept a business offer by a plaint.

4. Sec. 2(c) Parties to Contracts.—There must be at least two parties to a contract. No doubt a contract implies two parties; but a contract in writing in this country does not necessarily imply that the document must be signed by both the parties thereto. Thus, where a bond is executed by the defendant and delivered to the plaintiff, acceptance by the plaintiff completes the agreement between the parties.⁴ The party making a proposal which has been accepted is called the 'promisor', the person accepting the proposal is called the 'promisee'. In the case of reciprocal promises each party is at once the promisor and the promisee. A man cannot be the assignee of his own debt and cannot be the mortgagee of property of which he is also the mortgagor. The debt and the security are gone in such a case.⁵ A contract cannot be made by a party with himself along with others.⁶ The parties must be existing at the time when the contract is made. Thus, a company does not incur contractual relations with or obligations to the person purporting to act on its behalf before its formation. The company cannot, by adoption or ratification, obtain the benefit of such a contract, though after it comes into existence it may enter into a new contract on the terms of the old.⁷ Although a proposal must be made to an existing person it does not follow that it must be made to an ascertained person. Thus, a contract may arise on the performance by a person of conditions mentioned in an advertisement.⁸ Here, of course, the proposal is made to the public at large, but the contract is not formed until

2 *Ma Pwa v. Hmal*, 1939 R 86.

3 AIR 1969 SC 1157.

4 *Bouwang v. Banga*, 22 CLJ 311.

5 *Re Routledge*, (1904)2 Ch 474, 479; 73 LJ Ch 843.

6 *Napier v. Williams*, (1911)1 Ch 361; see *Ellis v. Kerr*, (1910)1 Ch 529, 534; 79 LJ Ch 291.

7 *North Sydney & Co. v. Higgins*, 1899 AC 263; *Natal Land &c. v. Pauline Colliery*, 1904 AC 120; *Re National Mail Coach*, (1908)2 Ch 515; *Re Empress Engineering Co.*, 16 Ch D 125.

8 *Williams v. Carwardine*, 110 ER 590; (1833)4 B & Ad 621, reward for giving information; *Barclay v. Pearson*, (1893)2 Ch 154, lottery; *Warlow v. Harrison*, 1 E & E 295; (1843-60) All ER Rep 620, sale by auction without reserve; *Shipton v. Cardiff Corp.*, 87 LJ KB 51, promise to pay a salary on enlistment by employee.

acceptance by a definite person or body of persons of the conditions. Acceptance by an ascertained individual or a number of individuals is necessary in order that a contract may arise.⁹ Whether the proposal in a case like this is capable of performance by one individual only, or by a number of individuals all of whom would be entitled to claim the reward offered, depends on other considerations.¹⁰ An open letter of credit is a contract with all the world. It is intended to be a representation or promise to any person, who should become in due course the holder of that bill of exchange, that the bill would be duly honoured,¹¹ independently of the equities between the original parties.¹² A contract was held to be complete with the nominee of a party when the offer was made to and the acceptance came from the party.¹³ The court as such cannot be a party to a contract, but the parties to proceedings in court are bound to respect the undertakings given by themselves.¹⁴

5. Sec. 2(d). At the desire of the promisor.—Request means such a request as would be necessary to support an action on the ground of an implied promise. It is not the same thing as solicitation.¹⁵ Thus, where a marriage is contracted at the desire of the promisor and in consideration of a promise to make a settlement of property, the marriage is a valuable consideration.¹⁶ But where A promised B in writing to pay £500 a year and also a legacy, and B showed the document to C, who thereupon consented to the marriage of her daughter with B, the allowance for one year was paid and there was no provision in the will in favour of B, *held*, there was no connection between the marriage and the promise to pay.¹⁷ In *Adaytya v. Premchand*¹⁸ the plaintiff failed to get relief because the court held that the act of the plaintiff did not amount to consideration where expenses had been incurred in order to please the collector and not at the desire of the defendants.¹⁹ Where a sum of money was due to the plaintiff from his tenants, two other persons agreed to pay it, less the collection charges, and they executed a mortgage for its due payment, the mortgage was without consideration as the plaintiff did not give the defendants authority to collect the amount.²⁰ An action will lie for services undertaken at the request of another.

9 *Spencer v. Harding*, LR 5 CP 561; see Halsbury's *Laws of England*, 4th ed. vol. 9 para 234.

10 *Lancaster v. Walsh*, 4 M & W 16; *England v. Davidson*, 11 A & E 856.

11 *Maitland v. Mercantile Bank*, 38 LJ Ch 363.

12 *Ex p. Asiatic Banking Corp.*, LR 2 Ch 391; *Modin v. Karu*, 1934 M 563 (usufructuary mortgagee of the lessee and the lessor).

13 *Ezekiel v. Carew*, 1938 C 423.

14 *Re Union Sugar Mills*, 127 IC 428, 433.

15 *Stackemann v. Paton*, (1906) 1 Ch 774, 781.

16 *Nanjunda v. Kanagaraju*, 42 M 154, 159; *Davenport v. Bishop*, 1 Ph 698.

17 *Dashwood v. Jermyn*, 12 Ch D 776.

18 49 CLJ 278; see *Shiba v. Tincouri*, 1939 P 477.

19 *Durga v. Baldeo*, 3 A 221.

20 *Parbhu v. Deoraj*, 11 IC 4.

An interesting question as to whether consideration was forthcoming at the request of the promisor arose in *Kedar Nath v. Gorie Mahomed*.²¹ The plaintiff and other Municipal Commissioners of Howrah were trustees of the Howrah Town Hall fund. The defendant subscribed his name in the subscription book for Rs. 100. After a time the trustees entered into a contract for the purpose of building the Town Hall. The defendant was sued for recovery of the amount promised by him and the suit was decreed, even though subscriptions to charitable objects are ordinarily irrecoverable. The court pointed out that the subscribers incurred liability because they knew that on the faith of their subscriptions an obligation was to be incurred by the plaintiff to pay the contractor. This decision is, however, in direct conflict with an English decision on similar facts.¹ A subscriber promised to pay in five equal annual instalments £20000 to a fund for the liquidation of chapel debts. He paid £12000 in three years and then died. A suit was filed against his executor for the recovery of the balance of £8000; *held*, there was no enforceable contract. There was no consideration of any sort for the promise to pay £20000, the sum of £12000 was not paid under any legal contract but was a purely charitable gift. The argument that there really was a consideration, because "the consideration was the risk and the liabilities which the parties were to undertake to compose themselves into a committee or become the distributors of the fund" was negatived by the court. According to this decision, therefore, what was once a *nudum pactum* cannot be converted into a contract by something subsequently done by one of the parties. The English authority cited by the author has now been followed in several cases in preference to the decision of the Calcutta High Court.² Where nothing has been done in furtherance of the object of the fund raised, a promised subscription is not legally recoverable.³ If a payment be voluntary the mere fact that such payment has been made in the past cannot be made the foundation of a legal obligation to pay in like circumstances in the future.⁴ A promise to subscribe to a festival being purely voluntary was held to be unenforceable. It was not proved that legal obligations had been incurred in consequence of the promise.⁵

It is not necessary that the promisor should derive any material benefit from the contract,⁶ or any benefit at all, for the benefit may be intended for a third party.⁷ A promise to perform an existing contract with a third party

21 14 C 64, fold in *Dist. Board, Ramnad v. Mahomed*, 1933 M 524; see *Raja of Venkatagiri v. Krishnayya*, 1948 PC 150.

1 *Re Hudson*, 54 L Ch 811.

2 *Doraswamy v. Arunachala*, 159 IC 345; see *Dinonath v. Hansraj*, 1936 C 44; *Taluk Board v. Sethna*, 1936 M 709.

3 *Abdul v. Masum*, 36 A 268.

4 *Jiban v. Nirupama*, 53 C 922.

5 *Kosalai v. Pulosthiam*, 72 IC 774.

6 *Bainbridge v. Firmstone*, 8 A & E 743: 112 ER 1019, the benefit may be trifling but not worthless.

7 *Bailey v. Croft*, 128 ER 470: 4 Taunt 611; *Haigh v. Brooks*, 10 A & E 309: 113 ER 119; *Newbury v. Armstrong*, 6 Bing 201; *Jennings v. Brown*, 9 M & W 496: 152 ER 210.

can be a good consideration for the promise of the promisor. Thus where A after agreeing to sell his factory to B refuses to do so unless he is paid by way of commission a sum of Rs. 80,000, and C who expects to receive his dues from A out of the sale proceeds promises to pay A the said sum of Rs. 30,000 if he sells his factory to B and executes a promissory note for that amount in favour of C, there is sufficient consideration for the promote, and A will be able to enforce it against C.⁸

6. Sec. 2(d). Any other person.—That consideration must move from the promisee is now a well-settled rule of English law.⁹ It means that the act or abstinence or promise constituting the consideration must be done, suffered or made, by the promisee himself and at the request of the promisor. But the words “any other person” indicate that consideration need not move from the promisee alone but may proceed from a third person. To that extent the Code has departed from the rule of English law. The definition of consideration, therefore, is wider than the requirement of the English law.¹⁰ A conveyance of property by B to C in satisfaction of A’s debt and accepted by C in satisfaction of it is founded on good consideration and would be binding on B.¹¹

In *Khawaja Muhammad v. Husaini Begum*,¹² the parents of the contracting parties to a marriage entered into an agreement that the defendant, the father of the bridegroom, would pay the plaintiff’s daughter Rs. 500 a month, the sum was made a charge on some immovable property specified in the agreement but the allowance was stopped some time after the celebration of the marriage. In a suit by the daughter-in-law to recover arrears of allowance from her father-in-law, *Tweddle v. Atkinson* was distinguished on the ground that the rule of common law was not applicable to the facts of the present case. The Privy Council observed that the allowance being specifically charged upon immovable property the plaintiff, although no party to the agreement, was clearly entitled in equity to enforce her claim. The third person on whom the benefit was intended to be conferred acquired a beneficial interest as a *cestui que trust* under the contract.¹³

Following the Privy Council decision it has been held that *Tweddle v. Atkinson* has no application here, and a person for whom a benefit as a *cestui que trust* is intended to be secured is competent to sue in his own right to

8 *Indermal v. Ramprasad*, AIR 1970 MP 40. See also *Gopal Co. Ltd. v. Hazarilal*, AIR 1963 MP 37; *Shadwell v. Shadwell*, 142 ER 62.

9 *Tweddle v. Atkinson*, 30 LJQB 265: (1861-73) All ER Rep 369; overruling *Dutton v. Poole*, 2 Lev 210; *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, 1915 AC 847, 853: (1914-15) All ER Rep 333.

10 *Debnarain v. Ramsadhan*, 17 CWN 1143, 1148; *Shiva v. Tincouri*, 183 IC 855.

11 *Dawson’s Bank v. May*, 1939 ALJ 844 PC.

12 37 IA 152 fold in *Ma Tin v. Byaw*, 126 IC 221; *Shuppu v. Subramaniam*, 33 M 238; *Sajjad v. Badshah*, 164 IC 823.

13 *Jiban v. Nirupama*, 96 IC 846; *Hashmatmal v. Pribhdas*, 114 IC 111; Halsbury, 4th ed. vol. 9 paras 330, 331.

enforce the trust,¹⁴ even though he was not a party to the agreement,¹⁵ although it is not the rule that anybody who receives any benefit under a contract between strangers can sue on the contract.¹⁶ A contract may be in form with a named person and yet be intended to secure a benefit to another as *cestui que trust* in such a way that the latter may sue in his own right to enforce the contract.¹⁷ In other words a person not a party to a contract cannot sue upon it unless rights have been conferred by way of property or by family arrangement.¹⁸

In *Fleming v. Bank of New Zealand*,¹⁹ a deposit of security by a third person with the defendant bank in consideration of the bank's promise to honour cheques drawn by the plaintiff was held to be a good consideration, because the third person had acted as the plaintiff's agent and therefore had obtained the promise from the defendant bank for and on behalf of the principal.

Though under the terms of this definition the consideration may be provided by some other person, yet a person not a party to the agreement cannot sue upon it.²⁰ Where a lessee assigns his interest reserving the right of re-entry on the failure of the assignee to discharge the lessee's liabilities to the lessor, and the lessor accepts part payment from the assignee without however recognising him as debtor, it is the lessee who is entitled to recover possession on the assignee's failure to discharge the debt of the lessee to the lessor; the lessor cannot recover possession as there is no privity of contract between the assignee and the lessor.¹ The rule is firmly established in England that if the plaintiff be a stranger to the contract he cannot maintain an action on it; natural love and affection and mere relationship do not give a right to sue.² A manufacturer of patent articles pasted on an article a printed slip which stated that it was one of the conditions of sale that the article was not to be resold at less than a specified price; a purchaser of the article from the agent of the manufacturer was not bound by the condition.³ As has been observed in *Dunlop*

14 *Hashmatmal v. Pribhdas*, 114 IC 111.

15 *Torabaz v. Nanak*, 138 IC 263.

16 *Debnarain v. Ram*, 9 IC 988.

17 *Khirode v. Raja Narendra*, 23 CWN 453, 459; *Ram v. Chauth*, 158 IC 46; *Husani v. Gauhar*, 7 Luck 292; *Moti v. Akbar*, 1939 B 309.

18 *Bhabhootmal v. Moolchand*, 1943 N 266.

19 1900 AC 577.

20 *Shankar v. Umabai*, 37 B 471; *Itti v. Dharman*, 41 M 488; *Krishna v. Pramila*, 55 C 1315, 1326; *Mittar v. Data*, 90 IC 1000; *Adhar v. Dolgobinda*, 40 CWN 1037; *Suraj v. Ram*, 1947 Pat 131; *Raja Shiba v. Tincouri*, 1939 P 477; *Jnan v. Manoranjan*, 1942 C 251; *Hukum v. Jeth*, 1944 S 205; *Seal v. Aramugam*, 1938 R 35; *Biraj v. Purna*, 69 CLJ 550; *Shiv Dayal v. Union of India*, AIR 1963 Punj 538

1. *Prakash v. Harman*, AIR 1973 SC 2065.

2. *Tweddle v. Atkinson*, 30 LJQB 265; (1861-73) All ER Rep 369; *Price v. Easton*, 4 B & Ad 433; 110 ER*518.

3. *Taddy & Co. v. Sterious & Co.*, (1904) 1 Ch 354; *Mc. Gruther v. Pitcher*, (1904) 2 Ch 306; but see *Strathcona S. S. Co. v. Dominion Coal Co.*, 1926 AC 108; *Shikar v. Shankar*, 34 ALJ 1012.

Pneumatic Tyre Co. v. Selfridge & Co.:⁴ "Under the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of a contract. Such right may be conferred by way of property as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*." The purchaser of the mortgagor's title in the mortgaged property is not bound by the personal covenant to the mortgagee.⁵ Where a mortgagee retained in his hands a part of the purchase money for payment to another creditor, a suit by the creditor against the mortgagee for the recovery of the money was held not to be maintainable, as no trust was created in the creditor's favour.⁶ Where the plaintiff firm at K asked a firm in Madras to purchase yellow metal from England and the Madras firm entered into a contract with a firm in London, *held*, there was no privity of contract between the plaintiff firm and the London firm and the former, therefore, had no cause of action against the latter.⁷ Where one of the defendants is not a party to the arrangement he has not incurred any contractual liability.⁸ A person who is not a party to the contract cannot gain any advantage under it if he is not in the position of a *cestui que trust*,⁹ nor is he bound by it.¹⁰ A woman entitled to maintenance under a *solenama* in lieu of her interest in land is in the position of a *cestui que trust vis-a-vis* the contracting parties and can, therefore, sue the vendee of the land for arrears of maintenance, though he is a stranger to the contract.¹¹ A person not a party to a contract cannot, subject to certain well-recognised exceptions, enforce the terms of the contract: the exceptions are that beneficiaries under the terms of a contract or under a family arrangement forming part of a contract may enforce the covenant.¹² Of course, a person who takes a benefit under a contract, to which he is not a party, is bound by the conditions attached to it.¹³

Where a sum of money is payable by A for the benefit of B, B, it has been held in some cases, can claim under the contract as if it has been a contract made with himself,¹⁴ i.e., in what may briefly be described as cases of trust,

4 (1915) AC 847, 853; see *Vandepitte v. P. A. A. Insurance*, 1933 PC 11.

5 *Jamna Das v. Ram Autar*, 39 IA 7; see *Achuta v. Jainandan*, 96 IC 287.

6 *Maghi v. Darbara*, 14 Lah 675; *Ganesh v. Banta*, 15 Lah 118, see cases *referred to*; but see *Naima v. Basant*, 56 B 766.

7 *Krishna v. Yuille*, 99 IC 278; but see *Gopal v. Behrens*, 123 IC 118.

8 *Grihi v. Baijnath*, 6 IC 412.

9 *Sogai v. Warloo*, 48 IC 549; *Manmath v. Ameer*, 46 IC 98; *Saraswati v. Haibat*, 1945 N 261.

10 *Nobin v. Nabab*, 5 CWN 343.

11 *Hare v. Fakir*, 40 CWN 703; *Narayani Devi v. Tagore Commercial Corporation Ltd.*, AIR 1973 Cal 401, 405-6.

12 *M. C. Chacko v. State Bank*, AIR 1970 SC 504.

13 *Kulondavahu v. Kamatchi*, 22 MLJ 456.

14 *Debnarain v. Ramsadhan*, 41 C 137; *fold in Nehal v. Fateh*, 68 IC 778; *Dwarika v. Priyanath*, 22 CWN 297; *distgd. in Humela v. Ori*, 33 ALJ 429; *Debnarain v. Chuni*, 18 CLJ 603, 611; see *Munisami v. Vedachala*, 101 IC 386; *Bibhuti v. Bailuntha*, 62 CLJ 55; *Bhujendra v. Sudhamoyee*, 62 CLJ 25; *Nanu v. Hedayet*, 62 CLJ 394; *Daw Po v. Po*, 1940 R 91; see *Lilley v. Hayes*, 6 LJQB 5; 111 ER 1272; *Rameshwar v. Janarain*, 1934 A 960.

quasi-trust, or near relationship.¹⁵ The principle does not apply to the case of a promise to advance money by means of a bond executed in favour of a party.¹⁶ When a contract of marriage has been entered into by the father for the benefit of his children, the real parties to contract are the children and they can, therefore, sue for the breach of contract.¹⁷ On a brother relinquishing his share in the family property in consideration of the other brothers maintaining their sister, she is entitled to sue her brothers for maintenance.¹⁸ The manufacturer of an article of food or medicine is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.¹⁹ A third party has a right to sue to recover from an agent moneys had and received to the plaintiff's use.²⁰

The rule of equity conferring a right on the third party to sue has been thus stated; "Now of course, as a general rule, a contract cannot be enforced except by a party to the contract and either of two persons contracting together can sue the other, if the other is guilty of a breach of, or does not perform the obligations of, that contract. But a third person, a person who is not a party to the contract, cannot do so. That rule, however, is subject to this exception. If the contract although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say that he has a beneficial right as a *cestui que trust* under that contract, then B would in a Court of Equity be allowed to insist upon and enforce the contract".¹ Where a provision in a family partition deed for the performance of the marriage of a daughter of the family creates a trust for her benefit, she can sue on the deed, although she is not a party to it.² Where a partner of an insolvent firm gave security for an advance by a bank to the firm, the bank thereafter sued on the security and obtained a decree which provided that it had no longer any claim against the insolvent firm, it was held that the Official Assignee, though not a party to the action, could take advantage of the release given under the decree.³ There are cases where, it has been observed, a third party who is not a party to the contract may have a valid claim against one of the contracting parties; but in all these cases the

15 *Adhar v. Dolgobinda*, 40 CWN 1037; *Pestonji v. Ravji*, 150 IC 483; *Devidas v. Birsing*, 1945 N 231; *Vandepitte v. P. A. A. Insurance*, 1933 PC 11.

16 *Humela v. Ori*, 155 IC 550.

17 *Muhammad v. Budha*, 1 IC 393; *Daropti v. Jaspat*, 49 PR 1905; see *Janak v. Gopi*, 1947 P 132.

18 *Peruri v. Grandhi*, 14 IC 517.

19 *Donoghue v. Stevenson*, 1923 AC 562; *Grant v. A Knitting Co.*, 1936 AC 85: (1935) All ER Rep 209.

20 *Mannath v. Thazeth*, 41 M 488 fold in *Pestonji v. Ravji*, 150 IC 483.

1 *Gandy v. Gandy*, 30 Ch D 57, 67: (1881-85) All ER Rep 376; *Akalla v. Dwara*, 1932 M 457; see *Re Empress Engineering Co.*, 16 Ch D 125 and *Re Rotherham & Co.*, 25 Ch D 103, as to conditions necessary to be fulfilled before a person not a party can sue on the contract. See *Hare v. Fakir*, 40 CWN 703; Halsbury's 4th ed. vol. 9 paras 341.

2 *Sundararaja v. Lakshmi*, 24 IC 943; *Re D'Angibau*, 15 Ch D 228, 242: (1874-80) All ER Rep 1184 (marriage settlement); but see *Nirmal v. Sumatbat*, 1943 S. 221.

3 *Re Industrial Bank*, 32 Bom LR 1656.

party proceeded against, as a result of the contract, secured some benefit for himself and the third party had an equity against him;⁴ in other words, a trust was created in favour of the plaintiff.⁵ A transfer of property to trustees for the payment of the debts of the owner, not acted upon by the owner nor assented to or acquiesced in by the creditors, does not make the creditors, who are not privies to the trust, *cestuis que trust*.⁶ The intention to constitute a trust must be affirmatively proved, it cannot necessarily be inferred from general words.⁷

The exceptions to the general rule, that a contract cannot be enforced by a person who was not a party thereto, arise from the following circumstances: (i) where one of the parties to the contract afterwards agrees with the stranger to pay him direct, (ii) where the contract creates a trust in favour of strangers, (iii) where the contract charges the money to be paid out of some immovable property, (iv) where the money is due to a stranger under a marriage settlement, partition, or other family arrangement;⁸ and (v) on ratification of a contract.⁹ As has been said, the proper person to bring an action is the person whose right has been violated. Exceptions, more apparent than real, occur in the case of agents, auctioneers or factors, etc. Managers of an insurance company, of which they are not members, cannot sue for premiums due.¹⁰

Following the rule thus laid down, where A mortgaged his land to B, part of the consideration therefor being B's promise to discharge a debt of A to C, the Madras High Court held that C, who was a stranger to the contract, was not entitled to sue B for the payment of the debt.¹¹ A person not a party to arbitration proceedings cannot maintain a suit on the award.¹² The case of an agent, however, is different.¹³ Similarly, where a Hindu assured his life with a company by an agreement under which the insurance company undertook to pay the insurance money, on the death of the assured, to his wife and children, the Full Bench of the Madras High Court held that the daughter of the insured was not entitled to enforce her claim as against the insurance company.¹⁴ The High Courts of Allahabad¹⁵ and Bombay¹⁶ have taken the same view. The

4 *Gulab v. Shahabuddin*, 130 IC 647.

5 *Rana v. Jang*, 43 CWN IPC see cases refd. to; *Seal v. Aramugam*, 1937 R 234.

6 *Naga v. Lakshmi*, (1938) 2 MLJ 1054.

7 *Vandepitte v. Accident Insee. Co.*, 31 ALJ 373 PC; *Appa v. Venkayamma*, 19 MLJ 106.

8 *Jagadamba v. Bibhooti*, 60 C 767; *Subbu v. Arunachalam*, 53 M 270 FB fold; *Protap v. Sarat*, 5 CWN 386 distigh.; *Debnarayan v. Chuni*, 41 C 137 and *Dwarka v. Priyanath*, 22 CWN 279 disstd. from; *Mithan v. Hemchand*, 157 IC 983 (composition deed); *Rameshwar v. Janarain*, 1934 A 960; *Kshirode v. Man*, 61 C 841.

9 *Keighley v. Durant*, 1901 AC 240, 246: (1900-03) All ER Rep 40.

10 *Gray v. Pearson*, LR 5 CP 568.

11 *Iswaram v. Sonnivaveru*, 38 M 753; see also *Mannath v. Thazeth*, 41 M 488; *Suryanarayana v. Basivireddi*, 55 M 436; *Wali v. Thakur*, 1936 O 313.

12 *Jagadambya v. Bibhuti*, 1933 C 407.

13 *Pestonji v. Ravji*, 150 IC 483; *Mannath v. Thazeth*, 41 M 488 refd to.

14 *Balamba v. Krishnayya*, 37 M 483, 507; see *Tibbitts & Englebach*, (1924) 2 Ch. 348.

15 *Mangal v. Muhammad*, 37 A 115.

16 *Shankar v. Umabai*, 37 B 471; *National P. Co. v. Popalal*, 38 Bom. LR 610.

Calcutta High Court, it would appear, has also come to adopt this view, inasmuch as it has laid down that there must be an obligation in equity amounting to a trust arising out of the contract to entitle a party to sue one who is not a party to the contract.¹⁷ Where S, an agent appointed by the Government to procure rice, is required to deposit a specified amount with a recognised bank as security for due performance of the contract and the bank gives a receipt stating "received from S on account of the District Magistrate", the money from the bank is recoverable by S and not by the Magistrate as there is no privity of contract between the Magistrate and the bank.¹⁸ It may, therefore, be now regarded as the settled opinion of various High Courts that though consideration may come from a third party, he cannot sue on the contract if he be a stranger to it, even though under the contract some benefit be reserved for him. There are, however, certain exceptions to this doctrine, *e.g.*, where a trust arises out of the contract, as stated above, or where the third party is a benamidar, or in the case of family settlements or partition arrangements, where certain benefits are secured to certain members,¹⁹ or in the case of marriage settlements for the benefit of children.²⁰ The father of an apprentice who is a minor can, in certain circumstances, maintain suits against the master of the apprentice for the recovery of the apprentice's wages.¹ Ordinarily, the rule of law is that an arrangement cannot be impugned by a third party unless it be entered into with the object of defrauding the third party, *e.g.*, in case of a colourable assignment of property.² If A makes a contract with B for the benefit of C, C cannot on that account sue on the contract.³ The rule that a contract affects the parties only, and that it can create no right or liability in a person who is not a party to it, applies in equity also.⁴ Certain exceptions have been engrafted upon the rule by the application of equitable considerations. An analysis of the cases, it has been pointed out,⁵ will, in fact, show that it is where a trust or an agency

17 *Krishna v. Pramila*, 55 C 1315, 1327; *Adhar v. Dolgobinda*, 40 CWN 1037; *Mukherjee v. Kiran*, 42 CWN 1212; see *Colyear v. Musgrave*, 2 Keen 81; 5 LJ Ch 335; 48 ER 559.

18 *United Commercial Bank v. O. G. B. Syndicate*, AIR 1968 SC 1115.

19 *Areti v. Areti*, 47 MLJ 517; *Arumuga v. Chinnammal*, 21 MLJ 918; *Blackwell v. Jones & Co.*, 7 Bom. HCOC 144, 148; *Rajagopala v. Radhaya*, 22 MLJ 159; *Shuppu v. Subramaniam*, 33 M 238; *Rukmabai v. Govind*, 6 Bom. LR 421; *Protap v. Sarat*, 5 CWN 386; *Sundararaja v. Lakshmiammal*, 38 M 788; *Daw v. Po*, 1940 R. 91.

20 *Krishna v. Pramila* 55 C. 1315, 1321; *Husaini v. Mohammad* 4 ALJ 13.

1 *Mutuvelu v. Govinda*, 117 IC 304.

2 *Jawala v. Bharat*, 10 IC 226.

3 *Tweddle v. Atkinson*, (1861) 121 ER 762; (1861-73) All ER Rep 369; see *Prive v. Eastern*, 4 B & Ad 433.

4 *Tasker v. Small*, 3 My. & Cr. 63; (1824-34) All Rep 317; *De Hoghton v. Money*, LR 2 Ch 164; *Markham v. Paget*, (1908) 1 Ch 697.

5 *Malda District Board v. Chandra*, 41 CWN 1008 refing to *Gandy v. Gandy*, 80 Ch D 57; (1881-85) All ER Rep 376; *Re Rotherham* 25 Ch D 108; *Re Empress Engineering Co.* 16 Ch D. 125; *Les Affreteurs & Co. v. Leopold*, 1919 AC 801; *Dunlop Pneumatic Co. v. Selfridge*, 1915, AC 847; (1914-15) All ER Rep 333; *Dan v. Sarla*, 1947 PC 8.

can be founded on the contract that a person, who is not a party to the contract, has been held entitled to enforce it. In *Debnarayan v. Chunilal*⁶ it was stated rather too broadly that *Tweddle v. Atkinson* was not applicable in India.

The general rule, according to English decisions, undoubtedly is that "no third person can sue, or be sued, on a contract to which he is not a party"; but at bottom that is only a rule of procedure. It goes to the form of remedy, not to the underlying right. Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him or, if he refuses to join, by adding him as a defendant. In that sense, and it is a very real sense, the third person has a right arising by way of contract. He has an interest which will be protected by law. A widow as an administratrix to the estate of her deceased husband can enforce as administratrix and in her personal capacity a contract between her husband and the purchaser of her husband's business whereby the purchaser agreed to pay an annuity of £5 weekly to the widow as part of the consideration for the purchase of the business.⁷ The observations to the contrary in *In re Miller's Agreement*⁸ and *Green v. Russell*⁹ seem to be erroneous. It is different when a third person has no legitimate interest, as when he is seeking to enforce the maintenance of prices to the public disadvantage, as in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*¹⁰ or when he is seeking to rely, not on any right given to him by the contract, but on an exemption clause seeking to exempt himself from his just liability. He cannot set up an exemption clause in a contract to which he was not a party.¹¹

By a bill of lading which incorporated the United States Carriage of Goods by Sea Act, 1939, and limited to \$500 (£179) per package the liability of the carrier in the event of loss, damage or delay, a drum containing chemicals was shipped from America to London. The appellants, who were stevedores engaged by the carrier, while lowering the drum from an upper floor of a dock transit shed on to a lorry, negligently dropped and damaged the drum when delivering it to the consignees in accordance with the bill of lading, causing part (worth £593) of its contents to be lost. The consignees, the respondents, sued the stevedores in tort claiming £593. The stevedores, relying on the bill of lading, claimed that their liability was limited to \$500. It was held by the House of Lords (Lord Denning dissenting) that the stevedores were not entitled to rely on the limitation of liability contained in the bill of lading since—

6 41 C 137 criticised in *Jiban v. Nirupama*, 53 C 922; *Krishna v. Pramila*, 55 C 1315; see *Adhar v. Dolegobind*, 63 C 1172; *Hare v. Fakir*, 40 CWN 703; *Subbu v. Arunachalam*, 53 M 270; *National Petroleum Co. v. Popatlal*, 60 B 954, disapproved in *Malda District Board v. Chandra*, 41 CWN 1008; disapproving also *Kshirode v. Mangobinda*, 61 C 841; *Moti v. Akbar*, 1939 B 309.

7 *Beswick v. Beswick*, (1967) 2 All ER 1197 HL.

8 (1947) Ch 615, 622.

9 (1959) 2 QB 226; (1959) 3 WLR 17; (1959) 2 All ER 525.

10 (1915) AC 847, 853; 31 TLR 399, HL (E).

11 *Beswick v. Beswick*, (1966) 3 WLR 396, 407 CA; on appeal, (1967) 2 All ER 1197; (1967) 3 WLR 982 HL; Halsbury, 4th ed., Vol. 9, Para 329.

(1) the word "carrier" in the Act did not include a stevedore and there was thus nothing in the bill of lading which stated or even implied that the parties to it intended the limitation of liability to extend to stevedores;

(2) the carrier did not contract as agent for the stevedores;

(3) there was no implied contract to which the present parties were parties that the stevedores should have the benefit of the immunity.¹²

Sellers delivered a fire tender sold under a contract of sale f.o.b. London, alongside a ship nominated by the buyers. While the tender was being lifted on to the vessel by the ship's tackle it was dropped and damaged. Under the contract of sale the property had not then passed. All arrangements for the carriage of the goods had been made by the buyers. A bill of lading in respect of the tender had been drawn up but was not issued. The sellers sued the shipowners in tort for £966, the cost of repairing the tender. The shipowners admitted liability, but claimed that the amount was limited by Article 4, Rule 5, of the Hague Rules, which provided as follows: "Neither the carrier nor the ship shall...be...liable for any loss or damage to goods in an amount exceeding" in effect £2000.

The sellers contended, *inter alia*, that even if the rules could be applied to the operation of loading at the time of the accident, they had no application as between themselves and the shipowners because they were not a party to the contract of affreightment.

It was held that the inference should be drawn that it was the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him; that the sellers, therefore, were parties to the contract made by the buyers and were bound by the Hague Rules embodied in it and, accordingly, the shipowners were entitled, as against the sellers, to limit their liability.¹³

Where a colliery books a consignment of coal for carriage by rail and the freight is payable by the consignee a privity of contract is established between the consignee and the railway. If the consignee declines to accept the consignment the railway can recover demurrage from the consignee.¹⁴ Where the bill of lading exempts not only the carrier but also its servants from liability for negligence, the stevedore can claim the benefit of the exemption clause.¹⁵ There has been a great divergence of opinion in the courts in India as to how far a stranger to a consideration can enforce the contract and how far the rule of English law is applicable in this country. That a stranger cannot sue on a contract has been laid down by the Privy Council.¹⁶ The exceptions to this general rule have been already stated (see *ante*). The case of *Khwaja Muhammad v. Husaini Begum*¹⁷ has, in some decisions, been taken as laying down the rule

12 *Midland Silicones Ltd. v. Scruttons Ltd.*, (1962)2 WLR 185 H.

13 *Pyrene v. Scindia Navigation Co. Ltd.*, (1954)2 WLR 1005; (1954)2 All ER 158.

14 *Kuchwar Lime and Stone Co. v. Dehri Rohtas Light Rly Co.*, AIR 1973.

15 *New Zealand Shipping Co. Ltd. v. AM Sallerthwaita & Co. Ltd.*, (1974)1 All ER 1015 PC.

16 *Jamnadas v. Ram Autar*, 39 IA 7 reld. to.

17 37 IA 152.

that Indian courts are not bound by the English common law doctrine, while in other decisions a contrary view has been taken. If the law is that a person who is not a party to a contract cannot sue on the contract, though a benefit is secured to him, unless the case falls within the exceptions indicated above, it is no answer to say that all the parties are before the court.¹⁸ Another exception is seen in the case of a total failure of consideration, *e.g.*, where an auction purchaser has paid the full price, he can bring a suit to recover the money on being dispossessed of the property by a successful claimant.¹⁹

Generally speaking, the proposition that a person who is not a party to a contract has no right to bring a suit under the contract must be accepted, but in suitable cases, this general rule must give way. There is no provision anywhere in law that a person who takes a benefit under a contract, although he is not a party to the contract, cannot sue. In a Patna case an insured cover containing currency notes was not delivered to the addressee. The Patna High Court held that the addressee was entitled to sue the Post Office though the contract was between the sender and the Post Office and though sec. 33 of the Post Office Act, 1898, speaks of the sender and says nothing about the addressee.²⁰

A contract cannot impose any liability on a stranger to it. But an action will lie for maliciously procuring a person to break his contract, *e.g.*, it will lie by a master against a person who, with notice, procures the servant to leave his master's service.¹

The law permits a carrier to stipulate for exemption from liability of those whom he engages to carry out the contract, even though they are not parties to it, provided the injured party assents expressly or by necessary implication to the exemption². Where three directors after advancing money to the company agree that none of them will be entitled to recover his dues from the company until the company's loan to a subsequent financier is repaid and one of the Government in making the offer.¹¹ Consideration which consists in the financier, the company cannot rely upon the agreement between the directors by way of defence, but can procure a dismissal of the suit by impleading the two other directors who may prove the contract.³ Where P makes a contract for the benefit of himself and a third party, he is entitled to recover damages in respect of the loss suffered by the third party in consequence of the breach of contract even though he is not a trustee for the third party.⁴

7. Sec. 2(d)—Consideration.—The meaning of the term 'consideration' in English is as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered

18 *Subbu v. Arunachalam*, 53 M 270 FB, see authorities reviewed. See *Adhar v. Dolgobinda*, 40 CWN 1037.

19 *Mehr Chand v. Milki*, 13 Lah 618.

20 *Post Master General v. Ram Kripal*, AIR 1955 Pat 442.

1 *Lumley v. Gye*, 22 LJQB 463; *Bowel v. Hall*, 6 QBD 333.

2 *Adler v. Dickson*, (1954)3 WLR 696, 704 CA, (1954)3 All ER 397.

3 *Snelling v. John C. Snelling Ltd.*, (1972)1 All ER 79 QBD.

4 *Jackson v. Horizon Holidays Ltd.*, (1975)3 All ER 92.

or undertaken by the other".⁵ It has been defined as consisting of any damage or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another although no actual benefit accrues to the party undertaking.⁶ In order that there may be a contract there must be a consideration, i.e., a benefit to the one party and a detriment to the other.⁷ There is a good deal of difference between the motive for an act and the consideration or object of an agreement.⁸

Consideration is furnished not only where a benefit is conferred on the promisor but also where a promisee suffers a detriment, e.g., some loss or damage, or possibility of loss or damage, or shows forbearance in the exercise of a right.⁹ Where there is an existing debt payable within three years and a promissory note is given in respect of that debt, there is good consideration for the promissory note.¹⁰ In a contract entered into by the Government the advantage to be gained by a section of its subjects may be a good consideration. It is not necessary that there should be any personal advantage to the members of the Government in making the offer.¹¹ Consideration which consists in the promisee doing something at the request of the promisor must be of some benefit to the promisor. The court will not enquire whether the bargain was a good one or not,¹² or what benefit the promisor expected to derive.¹³ Any benefit, however small, is sufficient.¹⁴ The benefit may not only be slight but also problematical, e.g., the delivery of an invalid will,¹⁵ or an invalid licence,¹⁶ of an unenforceable guarantee,¹⁷ or a void deed of apprenticeship,¹⁸ has been held to be sufficient consideration,¹⁹ although the documents are practically worthless. As has been explained in *Haigh v. Brooks*,²⁰ it is no concern of the court to determine "the adequacy or inadequacy of the price paid or promised for the document....."

5 *Currie v. Musa*, LR 10 Ex 153, 162 cited in *Fleming v Bank of New Zealand*, 1900 AC 577, 586; see *Fanindra v. Kacheman*, 45 C 774, 778; *Balfour v. Balfour*, (1919)2 KB 571: (1918-19) All ER Rep 860.

6 Leake taken from *Carlill v. Carbolic Smoke Ball Co.*, (1891-94) All ER Rep 127: (1893)1 QB 256 cited in *Perumal v. Sendanath*, 44 IC 479; Halsbury, 4th ed. vol. 9 para 310.

7 *Edgware Board v. Harrow Gas Co.*, LR 10 QB 92, 96.

8 *Dwijendra v. Gopiram*, 53 C 51 fold in *Shanti v. Lalchand*, 103 IC 444; *Tekchand v. Harjas*, 117 IC 74; *Sudhindra v. Ganesh*, (1939)1 C 241.

9 *Jones v. Ashburnham*, (1803-13) All ER Rep 416: 4 East 463; Halsbury, 4th ed. vol. 9 paras 312, 313.

10 *Scott v. Fairlamb*, 53 LJKB 47.

11 *Municipal Corp., Bombay v. Secretary of State*, 58 B 660, 691-2.

12 *Moss v. Hall*, 5 Ex 46.

13 *Bainbridge v. Firmstone*, 8 Ad & El 743: 112 ER 1019.

14 *Haigh v. Brooks*, 10 A Q E 309: 113 ER 119: 9 LJQB 99.

15 *Smith v. Smith*, 32 LJCP 149: 143 ER 165.

16 *Begbi v. Phosphate Sewage Co.*, (1876)44 LJQB 233: 1 QBD 679.

17 *Haigh v. Brooks*, 10 A & E 309: (1835-42) All ER Rep 438.

18 *Westlake v. Adams*, 27 LJCP 271: 141 ER 99.

19 Leake 8 ed. 461.

20 10 A & E 309; Halsbury, 4th ed. vol. 9 para 317.

In *De la Bere v. Pearson*¹ the defendants advertised in their paper that their city editor would answer inquiries from readers desiring financial advice. The plaintiff asked the editor by a letter for the name of a good stock broker. The editor recommended a broker, who, unknown to the editor, was a bankrupt. Relying on the recommendation the plaintiff sent money to the broker for investment and the broker misappropriated it. The defendants were held liable on contract. Dr. Cheshire and Fifet (*The Law of Contract*, 7th ed. p. 74) have raised the pertinent question: did the plaintiff pay for the recommendation? The answer appears to be in the negative; if so the defendants might have been liable in tort but not on contract. With regard to loss or disadvantage to the promisee as constituting consideration, it may be illustrated by the case of *Bainbridge v. Firmstone*.² Bainbridge at Firmstone's request allowed him to weigh two boilers. Firmstone promised to return them after weighing them in as perfect a condition as they were at the time of the contract. He took the boilers to pieces but did not put them together again and was sued by Bainbridge. The court observed that "the defendant thought that he had some benefit; at any rate, there is a detriment to the plaintiff from the parting with the possession for over so short a time." A promise to pay a definite sum for an unascertained amount, such as damages claimed in an action, is good consideration.³ A promise to render future personal service is good consideration for a promise.⁴ Where after the death of his father, the son signed an acknowledgement to the creditor in respect of the debt due, the consideration for the promise was the desire to save the estate of his father from sale in execution of a decree.⁵ But where under an agreement to sell a house, the intending purchaser took possession of it, the vendor, it was held, could not sue for the purchase money, as there was no consideration and no sale, the deed not being registered.⁶

A promise by the father to pay £60 a year during her life to the mother of an illegitimate child of his, in consideration of her bringing up the child, was held binding and after the promisor's death his executors were bound to continue the payment out of his estate to the promisee.⁷ Leave of absence granted by a captain to a soldier at the request of the defendant and in consideration of a promise by the defendant that the soldier would return in ten days or the defendant would pay the captain £20 was held to be good consideration for the promise.⁸ An agreement ceding unconditionally all the proprietary interest in the family property to his brother, in consideration of the brother agreeing his interest in the property to be taken up by the Court of Wards for the purpose of liquidating the donor's debts, is a good considera-

1 (1908)1 KB 280, 287.

2 8 Ad & E 743.

3 *Crowther v. Farrar*, 20 LJQB 298: (1850)15 QB 677: 117 ER 615.

4 *Sri Mahadeo v. Baldeo*, 1943 O 89.

5 *Kundan v. Raghu*, 170 IC 424.

6 *Bihari v. Hira*, 170 IC 765, but see *Alamdard v. Moti*, 16 ALJ 454.

7 *Jennings v. Brown*, 9 M & W 496: 12 LJ Ex 86: 152 ER 20.

8 *Taylor v. Jones*, 1 Raym 312.

tion.⁹ Where in the operative part of a deed it was stated that in consideration of Rs. 5 and of the promises made, the deed was executed, the consideration was held to be not merely Rs. 5 but also the promises referred to.¹⁰ Where a consideration is partly cash and partly something which cannot be expressed in terms of money, the whole takes the character of the latter part.¹¹ An agreement to be bound by the statement of a party on oath to be taken in a particular manner is a valid contract for a good consideration.¹² Sale of the right to execute decrees was held to be valid under the terms of the agreement.¹³ An adjustment of a decree not having been certified to court is not binding on the plaintiff; it, therefore, constitutes no valid consideration for a bond executed by the defendant.¹⁴ Monetary help given to a *shebait* by the person nominated by him as his successor does not amount to consideration for the appointment and does not make the transaction a sale.¹⁵ A promise to pay a pension is gratuitous, it may be discontinued even after paying it for some time.¹⁶ Where, in order to screen a director, who was indebted for a large amount to a bank, a promissory note was executed in favour of the bank by a third party, so as to show him as a debtor to the bank and to wipe out the indebtedness of the director, *held*, as between the third party and the bank the promissory note was an effective contract, the credit to the director being a sufficient consideration for it.¹⁷ Where the plaintiff has a contingent right to get the costs of the proceeding if the judge chose to give them, it is a good consideration for the promise of the defendant to pay those costs that the plaintiff should give up that contingent right.¹⁸

Where defendant promised to pay Rs. 5 a month for life to the plaintiff for training the defendant in the arts of singing and dancing, but the work was done by the plaintiff's sister, the promise to the plaintiff was gratuitous.¹⁹ An agreement that the father will not sue the son on a promissory note if the son ceased to complain about the unequal distribution of property is void for want of consideration.²⁰ A bond given without consideration is void not only against the obligor but also against any assignee from him.¹ An agent may be an insurer of goods consigned to his care provided there be consideration for that insurance, the consideration would have to be something outside the terms of the agent's employment at the ordinary rate.² Consideration paid to

⁹ *Bithal v. Shankar*, 17 A 264.

¹⁰ *Nago v. Babaji*, 8 B 610.

¹¹ *Nabin v. Shona*, 35 CWN 279; *Hukum v. Hiralal*, 3 B 159 fold; see *Lala Himmat v. Llewhellen*, 11 C 486, *Sahadeo v. Kuber*, 1950 A (637).

¹² *Keshoram v. Peare*, 21 ALJ 209 fold in *Akbari v. Rahmat*, 146, IC 84 FB.

¹³ *Kangati v. Pati*, 1942 M 21.

¹⁴ *Pandurang v. Narayan*, 8 B 300.

¹⁵ *Nirmal v. Jyoti*, 68 CLJ 230.

¹⁶ *Wyatt v. Kreglinger*, (1933)1 KB 793; 1933 All ER Rep 349.

¹⁷ *National Bank v. Banshidhar*, 51 CLJ 56, 67 PC.

¹⁸ *Bracewell v. Williams*, LR 2 CP 196; 15 WR 130.

¹⁹ *Bachhu v. Chunder*, 38 IC 230.

²⁰ *White v. Bluet*, (1858)3 LJ Ex 36.

¹ *Graham v. Johnson*, (1869) LJ 8 Eq 36; 17 WR 810; 38 LJ Ch 374.

² *Guha v. Emperor*, 128 IC 578.

one of several joint promisors is legally sufficient to support the promise of all the joint promisors.³ The acceptance by the creditor of the sole liability of one of two joint debtors is a good consideration for his agreement to discharge the other debtor from liability.⁴ From long continued payment of cess an agreement to pay as well as consideration for payment may be presumed.⁵

Consideration is essential to the validity of every contract (s. 25). A contract without consideration, therefore, is not binding,⁶ nor a promise made upon the consideration of natural love and affection,⁷ or of moral obligation.⁸ Where under a contract with the carrier a stevedore is obliged to unload the goods of the consignee, the performance of such contractual duty by the stevedore is a good consideration for the promise made by the consignee exempting the carrier and its servants from liability for negligence.⁹ But a surrender or alienation by the widow of her entire estate to the next reversioner is valid without any consideration.¹⁰ Where parties to a transaction wish to uphold it, no stranger can challenge it for want of consideration.¹¹ One consideration may support all the promises made under a contract.¹² Where for only one consideration a person undertakes to do a number of things which constitute only one contract, the contract cannot be enforced piecemeal.¹³ Consideration is presumed in the case of negotiable instruments.¹⁴

When a contract consists of a number of terms and conditions, each condition does not form a separate contract but is an item in the one contract of which it is a part. The consideration for each condition in a case like this is the consideration for the contract taken as a whole. It is not split up into several considerations apportioned between each term separately.¹⁵

In the case of a contract with the Government the tender constitutes the offer which, after acceptance and being embodied in a formal document, becomes a contract. In such a case the fact of the earnest or security having been deposited is not an essential fact to be proved and it cannot be considered to be a part of the cause of action.¹⁶

8. Sec. 2(d)—Adequacy of Consideration.—See S. 25 and note.

9. Sec. 2(d)—Forbearance.—A promise to do what one is under a legal

3 *Munnial v. Duklo*, 89 IC 819; *Sornalinga v. Pachi*, 38 M 680 fold.

4 *San Ya v. P. R. Firm*, 1936 R 396.

5 *Annamalai v. Sriramanthu*, 1935 M 718.

6 *Re Whitaker*, 42 Ch 119.

7 *Tweedle v. Atkinson*, 30 LJQB 265; (1861-73) All ER 369; see s. 25.

8 *Eastwood v. Kenyon*, 30 LJQB 409; (1835-42) All ER Rep 133; *Holliday v. Atkinson*, 5 B & C 501; *Baumont v. Reeve*, 8 QB 483; 115 ER 918.

9 *New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd.*, (1974) 1 All ER 1015 PC.

10 *Karetti v. Karetti*, 17 IC 487.

11 *Maroti v. Radha*, 1945 N 60.

12 *Harris v. Venables*, LR 7 Ex 235.

13 *Bhabhootmal v. Moolchand*, 1943 N 266.

14 *Shaha v. Dulah*, 183 IC 615 FB.

15 *Chatturbhuj v. Moreshwar*, AIR 1954 SC 286, 242.

16 *S. P. C. Engineering Co. v. Union of India*, AIR 1966 Cal 259, 263.

duty to perform cannot form the consideration for a promise, but a forbearance to exercise a legal right is good consideration.¹⁷ Forbearance at the instance of a debtor to sue is sufficient consideration.¹⁸ This forbearance, however, may not be expressly asked for or given, but may be inferred from circumstances.¹⁹ Even in the absence of a distinct promise to abstain for a certain time from suing, if, in fact, some degree of forbearance has been shown, there is consideration.²⁰ Forbearing to press for immediate payment means giving the debtor a reasonable time, and a promise to give reasonable time for the payment of a debt is good consideration for a contract.¹ Where one brother at the request of another gave up and postponed a right which he had, and it was very probable that a loss might result to him from the postponement, the act was not gratuitous but formed good consideration for an implied promise to indemnify.² Where a party gives up a right to management and agrees to a common management, such giving up of a right is sufficient consideration.³ Wife's forbearance to sue is good consideration for her husband's promise to pay her an allowance.⁴ Forbearance to sue is good consideration for a promissory note, and consideration paid to one is sufficient to support the promise of all the joint promisors.⁵ The release of an original debtor is a good consideration for a promise by another to pay the same debt.⁶ A promise to pay an existing debt to a third person, *e.g.*, an assignee of a debtor, is good consideration for a promise by the latter not to sue for a given time.⁷ Where at the request of a person a creditor forbears from suing the debtor, this forbearance is sufficient consideration for a promise by that person to repay the debt⁸; so is a forbearance to continue an appeal good consideration for a promise to pay the amount of the claim.⁹ The withdrawal of objection against the validity of an adoption is a good consideration for a conveyance of property.¹⁰ Where parties executed a balance of account and thus assumed liability and were aware that further time for the payment of the debt would be given by the plaintiff, *held*, there was consideration in this forbearance to sue. Positive evidence as to consideration, *i.e.*, as to postponement of legal action is not essential in every case,¹¹ but may safely be assumed when the circum-

17 *Crowhurst v. Laverack*, 22 LJ Ex 57; Halsbury, 4th ed. vol. 9 para 322.

18 *Lakshumanan v. Bommachi*, 32 IC 416.

19 *Amin v. Guni*, 119 IC 766; *Anant v. Sarasvati*, 40 Bom LR 709.

20 *Fullerton v. Provincial Bank*, 1903 AC 309 approving *Alliance Bank v. Broom*, 62 ER 631; 2 Dr. and Sm. 289; *Srinivasa v. Ranganatha*, 36 MLJ 618.

1 *Oldershaw v. King*, 27 LJ Ex 120; 157 ER 213 Ex Ch LJ QB 406 CA.

2 *Re Chappell*, 16 QBD 305: 55.

3 *Kirtyanand v. Ramanund*, 1936 p. 456.

4 *Debi v. Ram*, 1941 p. 282.

5 *Anant v. Sarasvati*, 30 Bom LR 709; *Maung Me v. Sein*, 8 IC 962; *Sadaram v. Sahazada*, 154 IC 668.

6 *Mores v. Rajani*, 31 IC 29; *Sadaram v. Sahazada*, 154 IC 668.

7 *Morton v. Burn*, 7 LJQB 104: 112 ER 378.

8 *Vira v. Rama*, 12 IC 126.

9 *Zakir v. Gulab*, 17 IC 466.

10 *Subramania v. Venkata*, 6 M 254 foling *Callisher v. Bischoffsheim*, LR 5 QB 449.

11 As stated in *Amin v. Guni*, 119 IC 766.

stances so permit.¹² An auction purchaser of property relinquished his right in consideration of receiving a sum of money, the defendant being unable to pay it executed a mortgage bond, *held*, the consideration in substance was abstinence by the plaintiff from enforcing his right as purchaser; therefore, the mortgage bond was binding.¹³ Parties to a renewed promissory note, who were not parties to the original note, have been held to be liable on the renewed note, because of the creditor's forbearance to sue.¹⁴ A forbearance of the plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, constitutes a good consideration for a fresh agreement, though the original agreement has been in the nature of a wagering transaction, and the plaintiff is entitled to recover.^{14a}

If an intending litigant *bona fide* forbears a right to litigate a question of law or fact, which it is not frivolous or vexatious to litigate, he does give up something of value. Of course, forbearance of a non-existing claim would not be forbearance at all.¹⁵ Where the plaintiff knowing that he has no cause of action initiates legal proceedings, his forbearance to prosecute is no consideration for a promise to pay a sum of money.¹⁶ Therefore, in order that forbearance should be a consideration some liability must be shown to exist, or be reasonably supposed to exist, by the party.¹⁷ The abandonment of a disputed or doubtful claim is a valid consideration, it makes no difference even if the claim is ultimately found to be without foundation.¹⁸ But if one of the parties knows that he has no case, the compromise would not be binding.¹⁹ Thus, a settlement made for the purpose of getting rid of a certain title, set up without the knowledge of the person concerned and without resulting in any benefit to him, cannot be regarded as a settlement of that claim.²⁰ A promise to defer bringing a suit upon a void contract does not amount to a consideration.¹ Forbearance to sue in respect of a fictitious demand cannot constitute good consideration.² As has been said, forbearance to sue constitutes a valid consideration when the plaintiff acts in the *bona fide* belief that he has a true claim.³

12 *Ranjit v. Fatehadin*, 134 IC 1105.

13 *Fanindra v. Badruddin*, 5 IC 581; see *Jogamma v. Pothanna*, 48 MLJ 287.

14 *Maung Kya v. ARM*, 11 IC 773; see *Dadabhoy v. Pestonji*, 17 B 457.

14a *Aya v. Badhu*, 1938 L. 781.

15 *Miles v. New Zealand Estate*, 32 Ch. D. 266, 291; see *Gopal v. Ghulam*, 27 IC 579; *Gulab v. Kamal*, 20 AL 285.

16 *Wade v. Simeon*, 15 LJCP 114.

17 *Court of Wards v. Makand*, 134 IC 819.

18 *Nathu v. Wali*, 143 IC 580; *Gopala v. Valli*, 1942 M. 21.

19 *Ralu v. Phalla*, 53 IC 497; *Gopal v. Dhani*, 118 IC 646; see cases *referred to*; *Olati v. Varadarajulu*, 31 M 474; *Krishna v. Hemaja*, 22 CWN 463; *Dadabroy v. Pestonji*, 17 B 457.

20 *Venkata v. Kotamma*, 50 MLJ 369.

1 *Gopinath v. Lakshinarain*, 32 IC 937; *Poteliakhoff v. Teakle*, (1938) 2 KB 816; (1938) 3 All ER 686.

2 *Jagaveera v. Alwarasa*, 45 IA 195.

3 *Gopal v. Dhani*, 118 IC 646; see cases *referred to*.

Forbearance to sue on a mortgage is a good consideration for a fresh bond executed by the mortgagor jointly with others.⁴ The mere existence of a debt, however, from A to B is not sufficient valuable consideration for the giving of a security by A to B in order to secure that debt. If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may readily imply an obligation to give time.⁵ Where B and his father gave a promissory note to A for a debt due from B's father to A, A forbore from suing for some years, the father died, then A sued B on the note, *held*, the form of the note was immaterial and there need not be an express request to forbear. If a request was implied from the circumstances it was the same as if there was an express request.⁶ The effect of giving a promissory note on account of a debt is that the original bill still remains, but the remedy is suspended till the maturity of the instrument in the hands of the creditor.⁷ Promise to abstain from suing can be a consideration for a fresh promissory note only where the person suing has a subsisting right which could be enforced against the promisor, otherwise not. Where a debtor fails to pay instalments fixed by the Debt Settlement Board and their recovery becomes barred on account of the creditor's failure to take certain steps and the Debt Settlement Act, a promise to pay the barred instalments by a person other than the debtor cannot be a lawful consideration for a promissory note by such person.⁸ The acceptance of a bill or promissory note for a judgment debt is a binding contract. It operates as an agreement not to sue, not merely during the currency of the bill, but afterwards, notwithstanding dishonour, so long as the bill was outstanding in the hands of a third party.⁹ Where a contract is void as distinguished from illegal, *e.g.*, in case of a wager under English law, while the plaintiff cannot sue for the recovery of the money won by him in betting, nor on a bill, note or cheque, given to pay the money lost, he can sue upon a new contract not tainted with illegality and made for good consideration, *e.g.*, for forbearance of the plaintiff to sue coupled with his forbearance to have the defendant declared a defaulter.¹⁰ But a compromise of an action on a gaming debt cannot form sufficient consideration for a promise to pay the amount claimed.¹¹ It is the duty of a person to disclose a libellous matter, the forbearance to disclose it cannot form a valid consideration for a promise either to pay a sum of money or to release a debt.¹²

4 *Fanindra v. Kacheman*, 45 C 774.

5 *Wigan v. English & Scottish Asson*, (1909)1 Ch 291; (1908-10) All ER Rep 449 fold in *Glegg v. Bromley*, (1912)3 KB 474; (1911-13) All ER Rep 1138.

6 *Crears v. Hunter*, 19 QBD 341.

7 *Allen v. Royal Bank*, 95 LJPC 17, 20; *Ghulam v. Niamat*, 1938 L 781.

8 *Tulsabai v. Narayan*, AIR 1974 Bom 72.

9 *Re A Debtor*, (1908)1 KB 344; *Pran v. Jnano*, 1942 C. 47.

10 *Hyams v. Stuart King*, (1908)2 KB 696; see cases cited.

11 *Burrell v. Leven*, 42 TLR 407.

12 *Brown v. Brine*, 1 Ex D. 5.

10. **Sec. 2(d)—Compromise.**—A compromise of a claim or suit furnishes another illustration of forbearance.¹³ If an agreement is made to compromise a disputed claim, a forbearance to sue in respect of that claim is a good consideration. A compromise is effected on the ground that the party making it has a chance of succeeding, and if he *bona fide* believes that he has a reasonable ground for suing, his forbearance to sue will constitute a good consideration, because the other party gets the advantage of not being annoyed with an action. If a person, however, enters into a compromise knowing that his claim is unfounded and gains an advantage his conduct would be fraudulent.¹³ A compromise of doubtful rights is based on the assumption that there was an antecedent title of some kind in the parties which the agreement acknowledged and defined.¹⁴ To render valid a compromise of litigation it is not necessary that the question in dispute should really be doubtful, it is sufficient if the parties *bona fide* consider that there is a question to be decided between them,¹⁵ though in fact the claim be groundless,¹⁶ but not groundless on the face of it.¹⁷ Where there is no dispute of rights, the compromise fails, the parties are relegated to the position they occupied before the compromise.¹⁸ Compromise of a suit, irrespective of the rights or wrongs of parties, is not without consideration.¹⁹ It is not for the court to determine whether or not action could have succeeded if prosecuted to the end.²⁰ From the case of *Stapilton v. Stapilton*¹ down to the present day, family arrangements have been sustained by the court. Where a promise is made in consideration of the relinquishment of a claim to certain property, a suit for its recovery is not maintainable.^{1a} It is essential that the rights of the parties must be the fair subject of doubt.² Whether the parties held correct views of their rights and duties is immaterial.³ A compromise of a doubtful claim, even though it turned out to be illusory, is binding.⁴ “When parties whose rights are questionable have equal knowledge of facts and equal means of ascertaining what their rights really are, and they fairly endeavour to settle their respective claims among themselves, every court must feel disposed to support the conclusions or agreements to which they may

13 *Callisher v. Bischoffsheim*, LR 5 QB 449; Halsbury 4 ed. Vol & Para 321.

14 *Khunni Lal v. Govind*, 38 IA 87.

15 *Sundar v. Haro*, 116 IC 719; *Nochat v. Kalloor*, 33 IC 696; *Rasheshar v. Devi*, 19 IC 411; *Pahu v. Daulat*, 6 IC 651; *Mahmuda v. Shankar*, 53 IC 104; *Lucy's Case*, 4 DGM & G 356; *Rajkrishna v. Baraboni Coal Co.*, 62 C (364); *U. P. Govt. v. CMT Assn.*, 1948 O 54; *Vathiyam v. Vairlata*, (1948)1 Mad LJ 47.

16 *Jayawickere v. Amarasuriya*, 1918 AC 869; *Holsworthy Urban v. Rural Council*, (1907)2 Ch 62; *Baba v. Abbas*, 1934 O 442.

17 *Pestonji v. Meherbai*, 112 IC 740.

18 *U. P. Government v. C.M.T. Association*, 1948 O 54.

19 *Rameshar v. Babulal*, 1946 P. 97.

20 *Re Cole*, (1931)2 Ch 174; (1931) All ER Rep 663.

1 A Atk 2; Wh & TLC.

1a *Harihar v. Kesho Prasad*, 93 IC 454, 588, 610.

2 *Mrs. X v. Mr. X*, 98, IC 217 reld. to in *Lingappa v. Sangawa*, 12 Bom LR 370.

3 *Jagadindra v. Chandra*, 31 C 242.

4 *Sharda v. Husain*, 41 IC 877; *Bharat v. Balbhadhar*, 20 IC 429; *Jagat v. Hemendra*, 1953 C 263; *Baba v. Abbas*, 1934 O 442.

fairly come at that time and that notwithstanding the subsequent discovery of some common error," but not if the parties are not on equal terms.⁵ Compromises entered into between the parties with their eyes open cannot be lightly thrown away, as no court has the right to impose upon the parties its own view of the law.⁶ Settlement of a dispute as to the amount is a valid consideration.⁷ There must be a claim or debt, mere putting an end to certain disputes or controversies is not enough.⁸ Where the contract between the parties is to settle a doubtful right or question, whether it be of law or fact, by a give and take arrangement between themselves, such an arrangement will be upheld. Mistake in law is not a ground for setting aside a compromise if the parties to the transaction were in difficulty and doubt, and wished to put an end to dispute and to terminate or avoid litigation. A compromise of doubtful rights will not be set aside on any other ground than fraud. Nor will there be a mistake of fact so as to avoid the transactions under S. 20 if one of the parties, having or supposing he has a claim upon a subject-matter, compromises his claim, or if the right was really in one of the parties only and the other had no right whatever, or if he had no claim whatever but was honestly mistaken as to his claim.⁹ Where the stipulated sum on settlement of a claim is not paid, consideration for the settlement fails, the promisee is entitled to recover the whole amount.¹⁰ Persons who are not parties to a compromise cannot take any advantage under it.¹¹

A compromise of a pending litigation or withdrawal of proceedings is binding.¹² The compromise of a doubtful litigation is good consideration for the execution of a promissory note.¹³ When there is a dispute between the parties as to the amount really due from the defendant, the settlement of such a dispute without going to court forms a valid consideration.¹⁴ A compromise by the Official Liquidator between the creditors and the manager of a bank is binding.¹⁵ An agreement by a husband to pay a certain rate of maintenance to his wife, alleged to be unchaste, whose claim to maintenance is, therefore, doubtful, is not void, being in settlement of a doubtful claim.¹⁶ A *bona fide* compromise by the father in a pending litigation is binding on the sons.¹⁷ A compromise of a suit in which a minor is interested without leave of court does not bind the minor and is voidable.¹⁸ If there be at the date of the compromise a *bona fide* dispute as to the right to succeed to the

5 *Pickering v. Pickering*, 2 Beav 31, 56: (1835-42) All ER Rep 543.

6 *Radhanath v. Chandrai*, 104 IC 800.

7 *Mohra v. Kishori*, 1934 L. 163.

8 *Edwards v. Baugh*, 11 M & W 641: 152 ER 962: 12 LJ Ex 426.

9 *Tikam v. Abbas*, 152 IC 186.

10 *Dower v. Sohan*, 1937 L. 816.

11 *Drarnidhar v. Phul*, 24 Pat. 529.

12 *Bai Rewa v. Jethabhai*, 11 Bom LR 1064; *Murli v. Gobind*, 20 IC 817.

13 *Ram v. Gaya*, 12 ALJ 331.

14 *Molar v. Kishori*, 147 IC 1175.

15 *Sujan v. Lala*, 1940 L. 471.

16 *Indira v. Makarand*, 135 IC 406.

17 *Jaishi v. Suju*, 109 IC 776; *Ganesha v. Tuljaram*, 1 IC 380.

18 *Bhiwa v. Devchand*, 10 IC 909.

office of a priest, there is consideration for the contract.¹⁹ A contract to pay a higher rate of interest, the consideration for which is the settlement of disputes as to the rate and abandonment of still higher claims on the part of the landlord, is valid and enforceable,²⁰ but not, if no dispute existed.¹ A compromise of a law suit by which the amount of the decree was by arrangement of counsel left to be determined by counsel for one of the parties was held not to be legal, as the counsel had no express authority to bind the parties to any definite figure and also because the parties were not *ad idem*.² Where parties believed in the existence of a right on one side and an obligation on the other, and there was no question of undue influence or fraud, a promissory note executed in order to obtain a release from the obligation is supported by consideration.³ Release of a disputed right is a valuable consideration for a promise, *e.g.*, a promise to pay an annuity to a mistress in lieu of a promise to marry alleged to have been made to her by the grantor of the annuity.⁴ In judging the validity of a compromise, the court is not entitled to enquire into the rights of the parties as they stood before the compromise in order to see whether the compromise has recognised them; the court is only entitled to inquire whether the claims advanced by either side are *bona fide* and whether the compromise really is in settlement of such claims.⁵ In order to find out whether there is consideration for a compromise of a doubtful claim in a pending suit, the test is not whether the plaintiff bases his claim upon a certain right but whether he honestly believed that he had a right when the compromise was entered into.⁶ A consent decree cannot have greater validity than the compromise itself.⁷ The principles applicable to the construction of contracts are equally applicable where a contract of compromise has passed into a decree.⁸ A compromise resulting in an agreement to pay a certain allowance by way of maintenance, even though incorporated in a decree, may be increased or decreased under a change of circumstances.⁹

An arrangement regarding the turn of worship and collection of offerings is binding. A person who has in the past received the benefit of such an arrangement cannot be allowed to resile from it when it comes to the turn of another to receive the benefit.¹⁰ On the dissolution of partnership and settlement of accounts, there is ample consideration for the promise given by each partner in the mutual promises made by the other partners, even though

19 *Girijanund v. Sailajanund*, 23 C 645; *Rameshwar v. Lachmi*, 31 C 111, 131-2.

20 *Vemury v. Yarlagadda*, 11 IC 699.

1 *Mallikarjuna v. Vemulapalli*, 10 IC 68.

2 *Jagatpat v. Puran*, 26 Bom LR 772, PC.

3 *Ajodhya v. Cox*, 48 IC 701.

4 *Keenan v. Handley*, 46 ER 384: 2 DGJ & S 283.

5 *Authi v. Annasami*, 23 MLJ 104.

6 *Jagat v. Hemendra*, 39 CWN 123, *Jayawickreme v. Amarasuriya*, 1918 AC 869 cited.

7 *Rani Anrita v. Sherajuddin*, 29 IC 156.

8 *Thayyammalachi v. Rajali*, 12 IC 334.

9 *Rampal v. Surendra*, 166 IC 194.

10 *Raghubar v. Rukmin*, 42 IC 794; *Rampal v. Durga*, 60 IC 440, 448.

the settlement was made after the accounts had been barred.¹¹ A party applying to the court for the enforcement of the part of the settlement which is in his favour must respect the rights of others under the same settlement.¹² It is within the power of litigants to compromise a suit without the acquiescence or even the knowledge of their attorneys. The exercise of this right is subject to the qualifications, *viz.*, the compromise must have been made with the honest intention of ending litigation and not with a design to deprive the attorney of his costs, and no payment can be made under the compromise to the prejudice of the attorney's claim after notice has been given to the person by whom the payment is to be made.¹³ The fact that the liabilities under a decree form the consideration for the compromise sued upon does not prevent the compromise being a new and independent contract which may form the basis of a suit.¹⁴ It is well established that an agreement in the nature of a compromise of a *bona fide* dispute as to the right of succession cannot be held to be without consideration.¹⁵ An agreement to compromise a suit must be established by general principles which govern the formation of contracts, though there are special rules governing its enforcement by the courts which arise out of its intrinsic nature. If the agreement purports to be concluded on behalf of one or both the parties by their respective legal advisers, the questions which arise, as on the formation of any contract¹⁶ by agents, are: (1) Had the agent, the natural authority of his principal, express or implied, to conclude the contract; (2) if he had no actual authority, had he ostensible authority so as to bind his principal against the other party, relying on ostensible authority; (3) will the court, where the suit is compromised, give effect to the terms agreed?

11. Sec. 2(d)—Family Settlement.—The parties to a family arrangement must be persons who have a right to the property and there must be mutuality among them in the arrangement.¹⁷ A family arrangement, like a compromise, is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the rights of the others as they had previously assented it, to the portions allotted to them respectively.^{17a} An arrangement between coparceners for the payment of marriage expenses of the female members of a family is an enforceable contract.¹⁸ A *bona fide* family arrangement in a suit by which a female member surrenders her own right and in consideration therefor takes a share in the family property is valid.¹⁹ The rule that a

11 *Rochi v. Faizullah*, 64 MLJ 596 PC.

12 *Amir v. Iqbal*, 61 IC 312.

13 *Khetter v. Kally*, 2 CWN 508; but see *Ramdoyal v. Ramdas*, 4 CWN 208.

14 *Ratanlal v. Anwar*, 53 IC 527.

15 *Sundar v. Haro*, 116 IC 719.

16 *Sourendra v. Tarubala*, 51 CLJ 309, 315-16 PC.

17 *Tang Min v. Ram*, 1934 R 176.

17a *Sadhu Madho Das v. Pandit Mukand Ram*, AIR 1955 SC 481.

18 *Anantanarayan v. Savithri*, 36 M. 151.

19 *Sureshwar v. Maheshrami*, 18 ALJ 1069 PC.

family settlement binds a minor member in the absence of fraud, etc., proceeds upon the principle that the minor was properly represented by the father or manager of the family. The rule, therefore, has no application where the person entering into the compromise had no authority to make the compromise on behalf of the minor. It cannot be made binding by calling it a family settlement.²⁰ For a family settlement to be valid there must be a bona fide dispute between the parties. The expression 'bona fide dispute' means nothing more than that each party must press his claim to the property by litigation or otherwise. The only requisite required to make a valid family arrangement is that it should be "a transaction between members of the same family which is for the benefit of the family generally, as for example, one which tends to the preservation of the family property, to the peace and security of the family and the avoiding of family dispute and litigation, or to the saving of honour of the family".¹ The existence of a dispute or the assertion of a claim is not necessary. If the settlement be made to promote peace and goodwill between certain members, there is good consideration. The courts will not look too closely into the quantum of consideration.² A trustee has no such interest in the property as will entitle him to enter into a family arrangement.³ A family arrangement is binding if made to prevent anticipated disputes actually arising.⁴ Although it is not essential that all members of a family need be parties to a family settlement, yet a person vitally concerned must be a party. The concurrence of an absent member must be subsequently obtained.⁵ It has been pointed out in *Ram v. Prayag*⁶ that in order to render valid the compromise of a litigation, it is not necessary that the question in dispute should really be doubtful if the parties *bona fide* consider it to be so. Family arrangements will be enforced if honestly made, although they have not been meant as a compromise but have proceeded from an error of all parties originating in mistake or ignorance of facts as to what their rights actually are or of the points on which their rights actually depend. A compromise of a family dispute is an agreement and both parties to the dispute must be represented in it. It is no compromise for one of such parties to declare his intentions before strangers to the dispute.⁷ Parties are bound by the terms of a compromise finally settling their rights *inter se*. The fact that one of the executants subsequently acts in a manner inconsistent with the compromise by denying the plaintiff's title does not justify the plaintiff in repudiating it.⁸ The cases establish that when once a family settlement has been entered into or acquiesced in by all persons interested in the family property, and has been

20 *Pratap v. Kaur*, 42 CWN 817 PC.

1 *Sidh Gopal v. Bihari*, 50 A 284; *Chahlu v. Parmal*, 17 ALJ 822; see *Sureshwar v. Maheshwari*, 18 ALJ 1069 PC.

2 *Latif v. Nabi*, 1932 A 174.

3 *Lekhranj v. Mehtab*, 1933 L. 861.

4 *Bajrang v. Rameshar*, 1937 O 189.

5 *Re Morton*, (1932) 1 Ch 505; (1932) All ER Rep 799.

6 8 C 138, cited in *Hassan v. Fazal*, 4 IC 954.

7 *Lochan v. Babi*, 4 IC 786, 789.

8 *Ganga v. Naraparaju*, 4 IC 303; *Kunti v. Gajraj*, 22 ALJ 779.

carried into effect, then none of the persons who consented thereto may thereafter be heard to repudiate that arrangement. It is not open to the heirs of a sane coparcener who divides joint property with an insane coparcener to challenge the partition on the death of the sane coparcener 30 years later. The partition is binding as a family arrangement.¹¹ But if it has not been acted upon and it deals with a *spec succesionis*, a party is not estopped from bringing a suit.¹² A compromise, resulting in the relinquishment of a claim of a joint family, which includes minors, against a person who has been ordered by court to make certain payments, is not binding on the minors if made without the sanction of the Court; so it can be set aside.¹³ A compromise, when there was no contest, by a female having a life estate, before a guardian was appointed of her minor son, was under the circumstances of the case held not to be a settlement of a *bona fide* family dispute.¹⁴ A compromise in the nature of a family arrangement is binding on a reversioner who has been a party and who has benefited by the transaction and upon his descendants claiming through him. A compromise of a claim made by the next reversioner in respect of the estate, if it amounts to a family settlement which is prudent and reasonable, is binding on the whole body of reversioners. A *bona fide* family settlement acted upon for a considerable time is not upset by subsequent adoption.¹⁵ The rule in England is that the court will support family arrangements and not scan too closely the quantum of consideration.¹⁶ If, however, the transaction has been unfair and founded upon falsehood and misrepresentation, a court of equity will have very great difficulty in permitting such a contract to bind the parties.¹⁷

12. Sec. 2(d)—Unreal Consideration.—A promise to do what one is already under an obligation to perform, whether under the law or by virtue of an existing contract, is not binding.¹⁸ Consideration in such a case is said to be unreal. Thus a promise to pay a *vakil*, already engaged, additional remuneration in the event of his conducting the suit to a successful termination is void, because no fresh consideration is forthcoming for the promise of paying additional remuneration.¹⁹ An arrangement to pay by instalments a sum due under a promissory note has been held in England to be void, as being not founded on any valuable consideration,²⁰ but see S. 62. So also an agreement between a judgment-debtor and a creditor that in consideration of the debtor paying down a part of the judgment debt and costs, and paying the residue

11 *Ma Kyaw v. Daw Kye*, 159 IC 798.

Ratneshwari v. Bhagwati, 1950 FC 142.

12 *Joti v. Beni*, 168 IC 512.

13 *Venkata v. Tuljaram*, 20 ALJ 833 PC.

14 *Narain v. Rajkumar*, 20 ALJ 251.

15 *Manmatha v. Gobinda*, 68 CLJ 173.

Vanka v. Mangala, 1950 M. 601.

16 *Ganesha v. Tuljaram*, 1 IC 380; *Williams v. Williams*, LR 2 Ch 294; 36 LJ Ch 419.

17 *Gordon v. Gordon*, 3 Sw 40, 463; see *Stockley v. Stockey*, IV & B 23; (1803-13) All Rep 543.

18 *Fraser v. Hatton*, 26 LJCP 226; *Jones v. Waite*, 5 Bing NC 341, 351.

19 *Ramchandra v. Kalu Raju*, 2 B 362; *Banda v. Banspat*, 4 A 352.

20 *Mc. Manus v. Bark*, 5 LJ Ex 65.

by instalments, the creditor would not take any proceedings against the debtor is *nudum pactum*¹; but the case is different where the payment is made to a stranger, *e.g.*, to the creditor's solicitor, for there is no obligation to do that.² Where a person contracts to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual, but it can support a contract with a stranger.³ A constable giving information in response to an offer of a reward which led to the conviction of a felon is entitled to the reward for having done something beyond the course of his employment.⁴ If a particular person desires protection of a special sort, and the police can give this without interfering with the discharge of other duties, a charge may be made in respect of such protection.⁵ So also a promise to pay a certain remuneration (not out of the estate) to an executor in order to induce him to accept office is binding, because the executor appointed is not bound to accept office.⁶ Where a vessel in consequence of the desertion of some of the crew was left short of hands, and the captain promised to pay the remaining seamen a sum in addition to their wages, *held*, as the ship had become unseaworthy they were not bound to go on and were free to make a new contract on the best terms they could,⁷ so also where a promise is made in view of risks not contemplated by the parties at the time of the bargain.⁸ After releasing a debtor from all debts, a creditor has no right to retain a security for a debt. The giving up of such a security by the creditor is no consideration for a promise by the debtor to pay any balance of the debt that may exist.⁹ An express promise to pay a lost bill of exchange, without some new consideration, is void.¹⁰ Where a *patta* provided for the payment of cess in addition to rent, but no cess was payable, there was no consideration for the payment of cess.¹¹ A promise to marry is a good consideration.^{12a}

13. Sec. 2(d)—Composition with creditors.—In English law the payment of a smaller sum can never be a discharge of a debt of a larger amount.¹²; without some consideration, the relinquishment of the residue of the claim will be *nudum pactum*.¹³ In the case of a composition with creditors, however, the

1 *Foakes v. Beer*, 9 AC 605: (1881-85) All ER Rep 106.

2 *Vanbergen v. St. Edmunds Properties*, (1933) 1 KB 345: (1933) All ER Rep 488.

3 *Scotson v. Pegg*, 6 H & N 295.

4 *England v. Davidson*, 11 A & E 856: 113 ER 640: 9 LJQB 287.

5 *Glassbrook v. Glamorgan C. Council*, 1925 AC 270.

6 *Narayan v. Shajani*, 22 C 14.

7 *Hartley v. Ponsoby*, 7 E & B 872.

8 *Liston v. S. S. Carpathian*, (1915) 2 KB 42 (capture at sea).

9 *Cowper v. Green*, 10 LJ Ex 346.

10 *Davis v. Dodd*, 4 Taunt 602.

11 *Bahadur v. Bedkantha*, 1947 C 70.

12 *Thomson v. Eastwood*, 2 AC 215, 234; *Foakes v. Beer*, 9 AC 605 (1881-85) All ER Rep 106. It is not the law in India, see S. 63.

12a *Srinivasa v. Parvathimmal*, AIR 1970 Mad 113, 116.

13 *Fitch v. Sutton*, 5 East 230.

14 *West Yorkshire &c. v. Coleridge*, (1911) 2 KB 326, 329; *Kheta v. Chuni*, 2 A 173; *Mallieou v. Hodgson*, 20 LJQB 339, 347.

consideration to each creditor consists in the forbearance of all the others.¹⁴ A creditor who is a party to such an agreement cannot sue for his original debt in contravention of the rights of the others. A promise by several defendants to take up the liability of the others is a valid consideration for the plaintiff agreeing to take a smaller amount from all the defendants.¹⁵ Where some creditors consenting to take less sign an agreement, but a creditor not signing sues and obtains the whole amount of the claim, the consenting creditor also can sue for his whole claim.¹⁶ The essential test of a composition deed is that there ought to be a compounding of debts due. It must be shown from the language of the deed that the debtor offered to pay less than what he owed to the creditors and that they agreed to accept that composition.¹⁷

14. Sec. 2(d)—Motive and consideration.—Motive is not the same thing as consideration.¹⁸ “The mere satisfaction of such a desire, unaccompanied by any present or future benefit accruing to the promisor or any detriment to the promisee, cannot be regarded as of any value in the eye of the law”.¹⁹ “Motives inducing a party to enter into a contract cannot be considered unless expressed in the contract itself”.²⁰ The general rule is that the court is not to weigh the motives which induce parties to enter into a contract.¹ Where the sons of a Hindu joint family transfer their undivided interest in the co-parcenary property to their father who in return gives away his right to receive monthly allowance from the sons, the relinquishment by the father of his right to receive allowance is not consideration for the transfer of the interest of the sons but a motive, occasion or reason for the transfer.²

16. Sec. 2(d)—Executory and executed consideration.—A promise by one party in return for a promise by the other is a good consideration, *e.g.*, a promise by a person to become a partner is sufficient consideration to introduce him as partner in the firm.³ In such a case the consideration is said to be executory. Where, however, one party has done or completed all that he promised or undertook to do when the promise was given by the other party, the consideration is said to be executed, *e.g.*, goods sold and delivered in return for a promise to pay. Where both parties have performed their respective promises the contract is at an end, both parties being discharged from their respective liabilities under it.

In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration.

In an executory consideration the liability is outstanding on both sides. It

15 *Narayana v. Ponnusawmy*, 3 IC 933.

16 *Andalammal v. Marga*, 1934 M 634.

17 *Shekh Adam v. Chandra*, 14 Bom LR 506.

18 *Thomas v. Thomas*, 2 QB 851; 114 ER 330; *Shripad v. Sanikatta*, 1954 B 82.

19 Anson, *Contract*, 17th Ed. p. 96.

20 *Boehm v. Wood*, 1 J & W 419, 422; (1814-23) All ER Rep 716; see *Waugh v. Morris*, (1873) LR 8 QB 202; (1861-73) All ER Rep 716, cited under S. 23 note 3.

1 *Downshire v. Sandys*, 6 Vps. 107, 114; see Halsbury, 4th ed., Vol 9 Para 311.

2 *S. Rajanna v. S. M. Dhondusa*, AIR 1970 Mys. 270, 276.

3 *M'Neill v. Reid*, 9 Bing 68.

is in fact a promise for a promise; one promise is bought by the other. The contract is concluded as soon as the promises are exchanged. In mercantile contracts this is by far the most common variety. In other words, a contract becomes binding on the exchange of valid promises, one being the consideration for the other.⁴

17. Sec. 2(d) Past consideration.—The use of the words “has done or abstained from doing” shows that the Indian law recognises the principle laid down in *Lampleigh v. Brathwait*,⁵ where B having killed P.M. asked A.L. to do all he could to get a pardon from the king. A.L. journeyed to and from London for this purpose at his own expense, and B afterwards promised him £100 for his trouble. As the amount was not paid A.L. sued B for the enforcement of the promise. The suit was decreed. A mere voluntary service, the court pointed out, could not support a promise, but if that service were moved by a request of the party making the promise the promise would not be naked but would couple itself with the previous request. In other words, the previous request and the subsequent promise formed part of the same transaction.

This case was decided in 1615. The principle laid down in this case was so extended in subsequent decisions that the distinction between executed and past consideration was almost obliterated. In the nineteenth century it became necessary to draw the line afresh between past and executed consideration and this was done in *Re Cusay's case*.⁶ In that case the joint owners of certain patent rights agreed to give C one-third share of the patents in consideration of C's services as the practical manager in working the patents. It was argued on behalf of the owners that their promise was made only in return for C's past services. In rejecting this contention Bowen, L.J., observed that the fact of a past service raised an implication that at the time the service had been rendered it was to be paid for and that a subsequent promise to pay was an admission which fixed the amount of that reasonable remuneration on the faith of which the service had originally been rendered.

The words “has done or abstained from doing” in sec. 2(d) also visualise a position where a prior service at the request of the promisor and the subsequent promise form part of the same transaction.

In *Sindha v. Abraham*⁷ services were rendered by the plaintiff at the desire of the defendant expressed during the defendant's infancy and continued at the same request after his majority, *held*, they formed a valid consideration for the defendant's subsequent express promise to pay the annuity secured by the agreement. Services at the desire of the promisor already rendered and such services to be rendered are placed in clause (d) upon the same footing. Either will constitute a good consideration for a definite agreement. Services rendered at the request of the defendant are a good consideration for a subse-

4 *Union of India v. Messrs. Chaman Lal & Co.*, AIR 1957 SC 652, 655, citing Chitty on Contracts, Vol. I, 21st ed., pp. 43-44; see also Chitty on Contracts 23rd ed. pp. 56-57.

5 1 Sm. LC 148, 13 Ed.

6 (1892) 1 Ch. 104, 115.

7 20 B. 755.

quent promise to pay. If, however, the services were not rendered at the desire of the defendant, they would have been voluntary and the case would have come under S.25. Where a minor borrowed a sum of money and executed a bond for it and on attaining majority executed a fresh bond for the amount due for principal and interest on the original bond, the advance made during minority was held not to constitute good consideration for the promise made upon attaining majority. Though a document may be actually executed after a consideration has passed, yet it may be supported by that consideration, if it were executed in pursuance of a preceding agreement of which this consideration was an essential part.⁸ An executed consideration is good consideration.⁹ Where a lawyer gave up practice and accepted the post of manager at the request of a landowner in consideration of a subsequent promise to give a pension, the acceptance of the service constituted a good consideration for the promise.¹⁰

18. **Sec. 2(e) Agreement.**—In order to constitute a binding agreement, the intention of the parties must be distinct and common to both; an agreement does not admit of difference.¹¹ Every promise is an agreement as also every set of promises “forming consideration for each other”, which expression relates to the words “every set of promises” and does not qualify the words “every promise”. So it comes to this that according to this definition a promise is an agreement though such a promise is unsupported by consideration. That consideration is not a necessary element in an agreement will appear from Ss. 10 and 25.¹² Agreement is reached by process of offer by one party and accepted by the other; and before the offeree can enforce the offeror’s promise the offeree must give the consideration requested in the offer.¹³

19. **Sec. 2(f)—Reciprocal promises.**—Reciprocal promises or, as is commonly said in English law, mutual promises, imply a promise by one party in consideration or part consideration of a promise by the other. Such a promise, of course, is capable of being turned into contract unless for some reasons the promise is not binding on one party, *i.e.*, mutuality is really lacking.¹⁴

20. **Sec. 2(g) Void agreement.**—What prevents an agreement from being enforceable in law is stated in S. 10, *sq.* The relation of counsel and client in England renders the parties incapable of making any legal contract of hiring and service concerning advocacy in litigation.¹⁵

21. **Sec. 2(h)—Contract.**—Consideration and promise are the two incidents necessary to constitute a contract. Taken together they form the whole

⁸ *Virapaxappa v. Muniappa*, 2 Bom. LR 69.

⁹ *Taluk Board v. Senthia*, 1936 M 709.

¹⁰ *Shiv Saran v. Kesho Prasad*, 42 IC 122.

¹¹ *Bijaya v. Secretary of State*, 150 IC 368.

¹² *Abaji v. Trimbak*, 28 B 66, 72.

¹³ *Halsbury's Laws of England*, 4th ed., Vol. 9, Para 206.

¹⁴ *Sutton v. Spectacle Makers Co.*, 10 LT 411, contract not binding on Corporation, because not under seal. Similarly, the sub-mission of a matter to arbitration must be signed by both parties.

¹⁵ *Kennedy v. Brown*, 32 LJCP 137 cited in *Alston v. Pitambar*, 25 A 509, 516. C & S 20.

of it.¹⁶ A contract means *consensus ad idem*.¹⁷ A contract is an agreement upon sufficient consideration to do or not to do a particular act. In order to constitute an agreement or contract two things are requisite, (1) the will, and (2) some act whereby that will is communicated to the other party.¹⁸ Whilst it is probably impossible to give one absolute and universally correct definition of a contract, the most commonly accepted definition is "a promise or set of promises which law will enforce".¹⁹ There is no concluded contract whereby only certain terms are settled, others left open. Negotiations and correspondence may be looked at to see if a firm contract has been arrived at. The result of a contract is to create a contractual obligation by virtue of which the contract is enforceable in law. The term obligation includes every duty enforceable by law. Obligation may be taken to be a tie or bond which constrains a person to do or suffer something; it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances; but, in order that it may be enforced by a court, it must be a legal obligation and not merely moral, social or religious.²⁰ Contracts effected in different markets for different quantities of particular commodities, with different dates of delivery, evidenced by separate memoranda, are distinct in the eye of law from one another; the liabilities of the parties are separate.¹ A judgment by consent in many cases operates as a contract.² A prospecting licence is merely auxiliary to a mining lease; in fact, it is merely a contract to execute the lease.

For a valid agreement for a lease to exist the parties and the property, the length of the term, the rent, and the date of commencement must all be defined. Accordingly where the date of commencement is absent, there is no valid concluded contract for lease.³

An agreement for a lease which is to contain "such other covenants and conditions as shall be reasonably required" by the lessor was not too vague or widely drawn as to be unenforceable but was sufficiently certain to be a concluded contract for a lease, and as such was capable of specific performance.⁴

A contract for the sale of a quantity of reinforcing steel bars was subject to "the usual conditions of acceptance". The seller having repudiated the contract, the buyers claimed, and were awarded by the trial judge, damages for breach of contract. On appeal, the seller contended that the contract was not concluded, there being no *consensus ad idem* in regard to the usual conditions

16 *Herman v. Jeuchner*, (1885) 15 QBD 561.

17 *Preston v. Luck*, 27 Ch. D 497, 502.

18 *Haynes v. Haynes*, 1 Dr. & Sm. 426, 433.

19 *Halsbury's Laws of England*, 4th ed., Vol. 9, Para 201.

20 *Bhudeb v. Kalachand*, 34 CLJ 315.

1 *Ulfat v. Nagarmal*, 1941 B 211.

2 *Bowes v. Foster*, 27 LJ Ex. 262. *C & D Surar Co. v. C. N. Steamships*, 1947 AC 46. *Munisami v. Vedachala*, 101 IC 386.

3 *Harvey v. Pratt*, (1965) 1 WLR 1025 CA applying *Marshall v. Berridge*, (1881) 19 Ch. D 233 CA.

4 *Sweet & Maxwell Ltd. v. Universal News Services Ltd.*, (1964) 3 WLR 356 CA; (1964) 3 All ER 30; (1964) 2 QB 699.

of acceptance. It was held that there being no "usual conditions of acceptance" the condition was meaningless and therefore could be ignored, and that the contract was complete and enforceable.⁵

In that case⁵ Denning L.J. said that a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, whilst still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms.

22. Sec. 2(h—j): Various kinds of contracts.—From these clauses it is clear that the legislature recognises the following kinds of agreements:

(1) *Valid Contract*.—This arises where the agreement is enforceable in law. Such a contract creates an outstanding obligation or legal liability, see S. 10 and also S. 73 as to the liability arising on breach of contract.

(2) *Voidable Contract*.—This arises where the outstanding obligation cannot be enforced by both the parties, but it is enforceable at the instance of one party only, so that he may, if he chooses, enforce it, but not the other; or one of the parties may evade his liability under the contract unless a third party has, in the meantime, acquired rights under the contract. See Ss. 19 *sq.*, 53, 55, 64, 66 of this Act and S. 30 of the Guardians and Wards Act. The defect in this case is not incurable but may be condoned, confirmed or ratified when the contract becomes unimpeachable. In fact, a voidable agreement remains valid until rescinded.⁶ The class of voidable contracts should be confined to those mentioned above and is not to be extended.⁷

(3) *Void Contract*.—Law in 2 (j) means substantive law.⁸ A void contract can give rise to no legal liability. The transaction is a nullity. It cannot, therefore, transfer any right as in the case of a voidable contract.⁹ But it has been said that the court will compel an attorney to perform an undertaking, even though it be void as a contract, "with a view to securing honesty in the conduct of its office".¹⁰ Now, an agreement may be void because of some defect in the substance, see S. 20, Ss. 23 *sq.*, or in procedure *i.e.*, the absence of a proper stamp on an instrument. In both cases the contracts would be called void contracts under clause (g). But in English law the latter class of contracts is known as *unenforceable* contracts; such contracts were good at their inception but cannot be proved in court for lack of some formality or other, see S. 56. So also where a debt is allowed to become barred by limitation it ceases to be enforceable in law, but it does not cease to exist for all purposes, see S. 25 (3), S. 60. Strictly speaking, void contracts should be called 'void agreements'.¹¹

⁵ *Nicolene Ltd. v. Simmonds*, (1953)1 All ER 822: (1953)2 WLR 717, 722, 724, CA, where *British Electrical etc. Ltd. v. Patley*, (1953)1 All ER 94: (1953)1 WLR 280, was considered.

⁶ *Reese R. S. Mining Co. v. Smith*, LR 4 HL 64.

⁷ *Municipal Corporation of Bombay v. S. of State*, 58 B 560.

⁸ *Mahanth v. U. Ba*, 1989 PC 110.

⁹ *Cundy v. Lindsay*, 3 AC 489.

¹⁰ *Re Hillard*, 14 LJQB 225; see *Re A Solicitor*, (1907)2 KB 539.

¹¹ *Central Bank v. Bapuji*, 1949 N 286.

Where shipowners made in the bill of lading a representation of fact which they knew to be false with intent that it should be acted upon, they were committing the tort of deceit, and the shippers' promise to indemnify the shipowner against loss resulting from the making of that representation was accordingly unenforceable.¹²

The plea of *non est factum*, which means that the document is a nullity, requires proof of a false statement as to the nature as distinct from the contents of the document. This distinction is often a question of degree.¹³

In *Mercantile Credit Co. v. Hamblin*¹⁴ the court had to consider the question of *non est factum*. Where *D* requested *P*, a motor dealer, to arrange for a loan of £1000 on the security of *D*'s Jaguar car, and *P* agreed to procure such loan from a finance company. *P* gave *D* a blank cheque and told *D* to fill the cheque for the amount of the loan on being informed over the telephone about the terms of the loan to be granted by the finance company. *P* suggested that to avoid unnecessary delay *D* should sign necessary documents and *D* signed three forms handed over to *D* in blank by *P*'s wife known to *D*. The forms in fact were (i) one of the finance company's hire-purchase proposal forms, (ii) a delivery receipt and confirmation of insurance cover, and (iii) a banker's order. *P* filled in the particulars in all the three forms, so that it appeared that *D* was offering to take the Jaguar car on hire-purchase from the finance company on the terms indicated in the documents. *P* also executed necessary documents purporting to sell the Jaguar car to the finance company as its absolute owner. The finance company accepted *D*'s purported offer contained in the proposal form and sent *D*'s banker's order to *D*'s bank. The finance company believing that it had bought the car from *P*, paid him in respect of the purported sale. *D* refused to pay the instalments due under the agreement and the finance company terminated it.

The finance company sued *D* for the return of the car or its value, alternatively for damages for its conversion, and also for the moneys due under the agreement and for damages for its breach. *D* set up *inter alia* the plea of *non est factum* by way of defence but the Court of Appeal held that the plea of *non est factum* could not succeed unless there had been a misrepresentation including a mistaken belief as to class and character of the supposed document, and since *P* had not made any misrepresentation as to the documents signed by *D*, *D* could not rely on *non est factum*. The suit, however, was dismissed on the ground that the proximate cause of the plaintiff company's loss was the fraud of *P* and not any negligence on the part of *D*.

The words "ex gratia" do not carry a necessary or even a probable, implication that the agreement is to be without legal effect. It is common experience amongst practitioners of the law that litigation or threatened litigation is frequently compromised on the terms that one party shall make to the other a

12 *Brown Jenkinson v. Percy Dalton*, (1957)3 WLR 403 CA: (1957)2 All ER 844.

13 *Hasham v. Zenab*, (1960)2 WLR 874, (P.C.); see Halsbury, 4th ed., Vol. 9, Para 284.

14 (1964)3 WLR 798 CA: (1964)3 All ER 592.

payment described in express terms as "ex gratia" or "without admission of liability". The two phrases are synonymous. No one would imagine that a settlement, so made, is unenforceable at law. The words "ex gratia" or "without admission of liability" are used simply to indicate, it may be as a matter of *amour propre*, or it may be to avoid a precedent in subsequent cases, that the party agreeing to pay does not admit any pre-existing liability on his part; but he is certainly not seeking to preclude the legal enforceability of the settlement itself by describing the contemplated payment as "ex gratia".¹⁵

¹⁵ *Edwards v. Skyways Ltd.*, (1964) 1 WLR 349, 356; (1964)1 All ER 494.

CHAPTER I

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

3. Communication, acceptance and revocation of proposals.

—The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Communication.—Without communication there is no agreement. Thus, where a reward is offered for an act, the doing of the act in ignorance of the proposal does not entitle a party to the reward.¹ Where each of two persons, in ignorance at the time of what the other did, writes a letter to the other on the same day, the one offering to buy and the other to sell, the same article at the same price, and the two letters cross each other, there is no contract.² Where, again, a proposal is made in such terms that it is not possible for the other party to accept or refuse it, then no contract can arise.³ Until a proposal is received there is no completed offer.⁴ Passing a resolution regarding a compromise in a confidential proceeding does not amount to communication of it.⁵ Without communication of offer no contract can arise.⁶ Mental assent, not followed either by communication or by any action, does not make a binding contract.⁷ In the case of acceptance also mental assent is not sufficient. It must be shown when the acceptor makes up his mind that he should signify it to the plaintiff, his having it in his own mind is nothing, "for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is".⁸

Act or omission. Communication need not necessarily be by words, but "may be expressed symbolically, as by the fall of the hammer upon a sale by auction⁹ or by a nod".¹⁰ When a proposal is made to another party and in that

1 *Fitch v. Snedakar*, 30 NY 248, an American decision. The English case of *Gibbons v. Proctor*, (1891)64 LT 594, where the contrary was held, cannot be regarded as of any authority; see Halsbury, 4th ed., Vol. 9, Para 259.

2 *Tinn v. Hoffman*, (1856)29 LT 271.

3 *Taylor v. Laird*, 25 LJ Ex. 329.

4 *E. B. I. & R. P. Co. v. Velayammal*, 1937 M 571.

5 *Ara v. Dy. Commissioner*, 1941 O 529.

6 *Central Bank v. Bapuji*, 1949 N 286.

7 *Brogden v. Metropolitan Ry. Co.*, 2 AC 666, 682-688.

8 *Brogden v. Metropolitan Ry. Co.*, 2 AC (692).

9 *Payne v. Cave*, 3 TR 148: (1775-1802) All ER Rep 492.

10 *Bird v. Boulter*, 4 B & Ad 443, Leake 10.

proposal there is a request, express or implied, that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound.¹¹ This is illustrated in the case of advertisements offering rewards on condition of doing a particular act. "The person who makes the offer shows by his language and from the nature of the transaction that he does not expect, and that he does not require, notice of the acceptance apart from notice of performance".¹² Communication ordinarily cannot be deemed to be made by 'omission'. Thus, where a proposal expressly says that acceptance will be presumed if no reply be received, the mere absence of a reply is no acceptance of the offer.¹³ Acceptance of an offer must be expressed and cannot be implied.¹⁴ Where communication of acceptance is necessary, its omission will be fatal.¹⁵ The communication need not be express, *e.g.*, where plaintiff sent a money order which the defendant accepted and sent no reply.¹⁶ In other words, although there has been no formal recognition of the agreement in terms by the one side, yet the course of dealing and conduct of the party to whom the agreement was propounded might be such as legitimately to lead to the inference that the contract which he had propounded had been in fact accepted by the person who so dealt with him.¹⁷ The offer and acceptance may be oral, yet the terms may be embodied in a document. In such a case the contract is in writing. Again, offer and acceptance may be in writing, yet the terms may be oral, then the contract is an oral one.¹⁸

4. Communication when complete.—The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

¹¹ *Brogden v. Metropolitan Ry. Co.*, 2 AG 666, 691; see s. 8.

¹² *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 QB 256, 262-3; (1891-94) All ER Rep 127.

¹³ *Felthouse v. Bindley*, 11 CBN S 869; *Perala v. Padmanathan*, 37 IC 792; *Haji Mahomed v. Spinner*, 24 B 510; *Gopi v. Raghu*, 1949 P. 522.

¹⁴ *Harvey v. Facey*, 1893 AC 552.

¹⁵ *Kennedy v. Thomassen*, (1929) 1 Ch. 426, 433; (1928) All ER Rep 525.

¹⁶ *Bishun v. Chandi*, 18 ALJ⁷³.

¹⁷ *Brogden v. Metropolitan Ry. Co.*, 2 AC 682.

¹⁸ *Imam v. Rani*, 1937 N 289.

Illustrations

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete,

as against A, when the letter is posted;

as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

1. **The section.**—The section describes when communication of a proposal, acceptance or revocation can be said to be complete. It is implied that such completed communication is essential to the formation of a contract.

2. **Communication of a proposal.**—Where a person does work for another without his knowledge or request, he has no claim upon that other for payment. Liability for payment arises where a person has power to accept or refuse services. There is no implied contract to pay for services in such a case.¹⁹ Therefore, not only must a proposal be brought to the knowledge of the person to whom it is made, but it must be so made that the person may be in a position to accept or reject the same.

3. **Contract with numerous conditions.**—In the case of a contract with numerous conditions the question sometimes arises how far a party is bound by them. Whether communication of those conditions has been effected? How far their knowledge can be inferred? In an ordinary case of a written agreement signed by the parties, the agreement is proved by proving the signature and, in the absence of fraud, it is wholly immaterial that a party has not read the agreement and is not familiar with its contents. Where the writing is not signed, though its contents constitute the sole evidence of the agreement, it must be independently proved that the other party has assented to it. Where, in the course of making a contract, one party delivers to another a paper containing a writing, *e.g.*, a ticket or a bill of lading, and the other party receiving the paper knows that it contains conditions which the party delivering it intends to constitute the contract, then the party receiving the paper, by receiving and keeping it, assents to the conditions contained in it, although he does not read them and does not know what they are. If, however, the person receiving the ticket did not see or know that there was any writing on the ticket, or that the writing contained conditions, he will not be bound by the conditions,²⁰ so

¹⁹ *Taylor v. Laird*, 25 LJ Ex 329, 332: (1856) 1 H&N 266: 156 ER 1203.

²⁰ *Parker v. S. E. Ry. Co.*, 2 CPD 416, 321-3: (1874-80) All ER Rep 166; *Henderson v. Stevenson*, 2 HL Sc 470: (1874-80) All ER Rep 436 distinguished in *Burke v. S. E. Ry.*, 5 CPD 1; *Harris v. G. W. Ry. Co.*, 1 QBD 515 *referred to*.

that in a contract of this nature the following questions arise; (1) Did the plaintiff know that there was writing or printing on the ticket? (2) Did he know that the writing or printing contained conditions relating to the terms of the contract? (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? If a person's attention is sufficiently drawn to the writing he is bound by the conditions contained in them.¹ The mere acceptance of a document, therefore, does not amount to a communication of all the terms of a proposal, though a presumption may arise of a knowledge of the terms.² The law has been summed up thus:³ "A condition printed on the back of a ticket is not binding on a passenger who has not read the condition and has not had his attention directed to the condition by anything on the face of the ticket or by the carrier when issuing it". Even when a person could not read she was held bound by the conditions, *e.g.*, those written in French, to which her attention was drawn by a writing on the ticket, "having regard to the authorities and the condition of education" in England. Reasonableness of the writing, therefore, is a factor to be taken into consideration. If, in the above instance, the conditions were written in Chinese, the passenger could not have been held bound by them.⁴ In *Mackillican v. Compagnie des Messageries Maritimes*,⁵ a passenger was held bound by conditions written in French although he could not understand French. The court observed in another case⁶ as regards the effect to be given to the prospectus as a part of the contract of insurance: "I think it will have the same effect as if it had been reproduced in the policy itself, it is quite unnecessary to prove that the prospectus had been read by the assured or that it was especially brought to the notice of the company apart from the reference made to it in the policy itself". It is well settled, however, that a purchaser of a lease is not to be held to be affected with constructive notice of the covenants contained in the lease merely because the lease is mentioned in the agreement for purchase, unless, before the agreement was made, he had a fair opportunity of ascertaining for himself the terms of such covenants.⁷

A motor car was delivered to a shipping company and the owner was given receipt for the freight paid. The ship sank through the negligence of the company's servants and the car was a total loss. In an action by the owner to recover its replacement value the company contended that they were absolved from liability for negligence in accordance with the terms of the conditions of

1 *Richardson v. Rowntre*, 1894 AC 217; *Thomson v. L. M. & S. Ry.*, (1930) 1 KB 41; (1929) All ER Rep 474; *Penton v. Southern Ry.*, (1931) 2 KB 108.

2 *Zunz v. S. E. Ry.*, LR 4 QB 539; *Thornton v. Shoe Lane Parking Ltd.*, (1971) 1 All ER 686.

3 *Hood v. Anchor Line*, 1918 AC 837, 842; (1918-19) All ER Rep 98; see *Roe v. Naylor*, (1917) 1 KB 712.

4 *Thomson v. L. M. & S. Ry. Co.*, (1930) 1 KB 41; (1929) All ER Rep 474; see *Madras Ry. Co. v. Govinda*, 21 M 172.

5 8 C. 227; see *Firm Mitha v. Firm Devi*, 1944 Pesh. 83.

6 *Oriental G. S. Life Assurance Co. v. Narasima*, 25 M 183, 205.

7 *Fleasman v. Corbett*, (1930) 1 Ch. 672, 682; (1930) All ER Rep 420.

carriage. Their normal practice in accepting goods for shipment was to give the consignor a receipt for the freight paid and a "risk note". The "risk note" consisted of a print of the conditions of carriage. In previous similar transactions with the company the car-owner had sometimes signed a "risk note", but on the present occasion no risk note was issued or signed. Although the car-owner knew that certain conditions of carriage were normally imposed, he did not know specifically what they were. It was held that this was an oral contract and the conditions relied on were not imported into it so as to exempt the company from liability for negligence. In the absence of any contractual document, a consignor of goods cannot, by a course of previous dealing, be bound by conditions of which he is generally aware but the specific terms of which he has no knowledge.⁸ A special condition for the protection of a party to the contract cannot be availed of if the party is guilty of fundamental breach. The doctrine of fundamental breach was thus formulated by Scrutton, L.J., in *Giband v. Great Eastern Ry. Co.*:⁹ "It is a fairly well-known principle... that if you undertake to do a thing in a certain way, or to keep a thing in a certain place with certain conditions protecting it, and you have broken the contract by not doing the thing contracted for in the way contracted for or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it". An exceptions clause is not nullified by a fundamental breach. If a breach occurs, entitling the other party to repudiate the contract, but he elects to affirm it, the exceptions clause continues unless on a true construction of the contract the exceptions clause is not intended to apply to and to continue after such a breach, in which case the party in breach is unable to rely on the exceptions clause.¹⁰ If the innocent party repudiates the contract on account of fundamental breach the party in breach cannot rely upon the exemption clauses.¹¹

4. Communication of acceptance.—The second paragraph applies to a case where the parties are at a distance from each other, so that the proposal and the acceptance cannot be simultaneous. The proposer, in such a case, makes a communication of his proposal which is complete when it comes to the knowledge of the person to whom it is made. Communication of acceptance under such circumstances will be complete, as against the proposer, when it is put in the course of transmission to him, and as against the acceptor, when it comes to the knowledge of the proposer.¹² A proposal, therefore, remains open for a reasonable length of time for acceptance unless, of course, it be duly revoked, before it becomes binding as against the proposer, i.e., before the communication of acceptance has been sent or posted. "A person who has made an offer must be considered as continuously making it until he has brought

8 *Mc Cutcheon v. David Macbrayne*, (1964) 1 WLR 125 HL.

9 (1921) All ER 39.

10 *Suisse Allantique etc. v. N. Y. Ratherdam etc.*, (1966) 2 All ER 61 HL.

11 *Farnworth Finance Facilities v. Attryde*, (1970) 2 All ER 774 CA.

12 See Halsbury, 4th ed., Vol. 9, Para 254.

it to the knowledge of the person to whom it was made that it was withdrawn".¹³ Unless an offer be accepted and acted upon within a reasonable time, it must be treated as abandoned.¹⁴

In *Haridwar Singh v. Begun Sambrai*¹⁵ at an auction for the settlement of a bamboo coup the highest bid of H was accepted by the D.F.O. subject to confirmation by the Government. During the pendency of the matter before the Government for confirmation H communicated his willingness to take the settlement at the reserve price which was higher than the bid. Thereafter H applied for settlement on the basis of the highest bid. The Government by a telegram to the Conservator of Forests confirmed the auction sale with H as the reserve price, but it was not communicated to H. Later on, the Government cancelled the settlement with H and settled the same with another person at a much higher price. Held that there was no concluded contract with H, because the telegram to the Conservator was not a communication of the acceptance of the offer of H to take at the reserve price, and because H himself revoked that offer later on by applying for settlement at the highest bid.

An offer is not an effective offer until it has been received. This is made clear by section 4 which provides that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The place from which the offer was actually despatched is immaterial.¹⁶

Ordinarily it is the acceptance of an offer and intimation of that acceptance which result in a contract. The offerer merely intimates his intention to enter into a contract; he cannot impose upon the offeree an obligation to accept. Hence mere making of an offer does not form part of the cause of action for damages for breach of a contract which results from acceptance of the offer.¹⁷

In English law, once the acceptance is complete as against the proposer a binding contract arises. This has been put on the ground "that both legal principle and practical convenience require that a person who has accepted an offer, not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and the acceptance constitute a contract binding on both parties",¹⁸ except in special cases, e.g., in the case of acceptance of shares,¹⁹ when the contract is complete not on the posting of the letter of acceptance but of the letter of allotment.²⁰ On the other hand, this paragraph of the section states that an acceptance is complete, when it is in the course of

13 *Henthorn v. Fraser*, (1892) 2 Ch. 27, 31: (1891-94) All ER Rep 908. See *Adams v. Lindsell*, 1 B and Ald. 681.

14 *Williams v. Williams*, 17 Beav. 213, 216: 51 ER 1015. See S. 6(2), S. 5 n. 1.

15 AIR 1972 SC 1242.

16 *Pokhar Mal v. Khanewal Oil Mills*, AIR 1945 Lah. 260, 263; *Ahmad Bux v. Fazal Karim*, AIR 1940 Mad. 49, 51; *Premchand Roychand v. Motilal*, AIR 1951 Bom. 249, 252, approving *Clarke Brothers v. Knowles*, (1918) 1 KB 128 and distinguishing *Engineering Supplies Ltd. v. Dhandhanania*, ILR 58 Cal 589.

17 *Bhagwandas v. Girdharilal*, AIR 1966 SC 543, 547 (per Shah J.).

18 *Byrne v. Van Tienhoven*, 5 CPD 344; *Re Imperial Land Co.*, LR 7 Ch. 587.

19 *Re Florence Land Co.*, 29 Ch. D 421.

20 *Re Imperial Land Co.*, LR 7 Ch. 527; see S. 5. n. b.

transmission as against the proposer only, a further time must elapse before it is complete as against the acceptor, viz., when it reaches the proposer.¹

In *Entores Ltd. v. Miles Far East Corporation*, the English Court of Appeal held that where a contract is made by instantaneous communication, e.g., by telephone, the contract is complete only when the acceptance is received by the offer, since generally an acceptance must be notified to the offerer to make a binding contract.

In India, too, the legal position is the same. A contract by telephone is governed by the ordinary rule which regards a contract as completed only when acceptance is intimated to the offerer. "If regard be had", says Shah J in *Bhagwandas v. Girdharilal*,² "to the essential nature of conversation by telephone, it would be reasonable to hold the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech; communication of acceptance is a necessary part of the formation of contract and the exception to the rule on grounds of commercial expediency is inapplicable." In other words, a contract by telephone is not analogous to a contract by post or by telegraph.

A contract binding on both parties, therefore, does not arise until the communication is complete as against both of them. This is made clear by the illustrations. A makes a proposal to B, B sends his acceptance by post. The communication of the acceptance is complete as against A when the letter is posted, and as against B when the letter is received by A. B, therefore, is at liberty to revoke his acceptance before the communication of acceptance is complete against him, i.e., before his letter is received by A. If he were, therefore, to send a telegram revoking the acceptance, and if the telegram reaches before the letter, the acceptance will be revoked. This has been regarded as an anomaly of Indian law. When the acceptance is posted, the contract is complete as against the proposer; any communication from him which reaches the acceptor after the posting, revoking the proposal, is altogether inoperative as against the acceptor. However, the contract is not complete at that moment and can be avoided by the acceptor by communicating to the proposer a revocation of the acceptance before the acceptance reaches the proposer. English courts will be bound to hold that an unqualified acceptance once posted cannot be revoked even by a telegram or special messenger outstripping the arrival of the acceptance, for the contract is concluded when the letter of acceptance is posted; the acceptor, therefore, is no longer at liberty to recede from it. Accordingly, it may be concluded that a contract is made at the time and at the place when and where the letter of acceptance is posted, but under this Act, the contract is voidable at the instance of the acceptor by communication of his revocation reaching before the acceptance has come to the knowledge of

1 This general rule may be modified by special rules in certain enactments, see *Lingo v. Secretary of State*, 30 Bom. LR 570, 577.

1a (1952) 2 QB 327.

2 AIR 1966 SC 543, 550.

the proposer.³ When authority, express or implied, is given by a creditor in Bombay to a debtor outside Bombay to send the title-deeds of certain immovable property by post, the Post Office is the authorised agent of the creditor to receive the title-deeds on his behalf. Under S. 7 the transaction is complete as soon as the debtor has posted the title-deeds to the creditor.⁴ Even though a contract be entered into orally, all subjects connected with the contract, *e.g.*, the exercise of an option under it, may be communicated by post.⁵

It follows that if there be a concluded contract when the acceptance is put in the course of transmission to the proposer, the mere fact that the acceptance does not reach the proposer will not affect the formation of the contract. This is the settled rule of English law. A person posting a letter of acceptance is not answerable for casualties occurring at the post office.⁶ Sending a cheque by post as requested is equivalent to payment.⁷ Where owing to the letter being misdirected the offer does not reach in time, and there is delay in acceptance, the offer is incapable of acceptance when it actually reaches the offeree.⁸ An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. Where a vendor giving an option to purchase to P makes it clear that the option is exercisable by notice in writing to the vendor the vendor makes the formation of contract dependent upon the actual receipt of the notice in writing. Hence no contract dependent upon the notice of the exercise of the option given by P actually reaches the vendor. Mere posting of the notice does not amount to acceptance of the offer to sell made by the vendor.⁹ If the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be open to the perpetration of much fraud. It is not always easy to fix the precise moment at which an offer is accepted and a contract emerges, especially when negotiations cover a long period.¹⁰ Where a tender submitted by S is accepted by the Government and S revokes the tender by sending a telegram which reaches the Government after the letter of acceptance has been posted, revocation is of no effect, because the contract is complete as soon as the letter of acceptance had been posted.¹¹

5. Revocation of proposals and acceptances.—A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

³ *Kamisetti v. Katha Venkata*, 27 M 355, 359, cited in *Muhammad v. Hateem*, 153 IC 111; *National Insurance Co. v. Seethammal*, 1933 M. 764; *Lin̄ga Gowder v. State*. AIR 1971 Mad. 28.

⁴ *Indian Cotton Co. v. Hari*, 38 Bom. LR 1222, no equitable mortgage created.

⁵ *Bruner v. Moore*, (1904) 1 Ch. 305.

⁶ *Dunlop v. Higgins*, 1 HLC 381: 9 ER 805 HL.

⁷ *Thairlwall v. G. N. Ry.*, (1910) 2 KB 509: (1908-10) All ER Rep 556.

⁸ *Adams v. Lindsell*, 1 B & Ald 681.

⁹ *Holwell Secretary v. Hughes*, [1973] 2 All ER 476 Ch D.

¹⁰ *Brogden v. Metropolitan Rail Co.*, (1877) 2 AC 686; *Beesly v. Hallwood Estate*, [1961] 1 All ER 90; *Robophone Facilities Ltd. v. Blank*, [1966] 3 All ER 128.

¹¹ *Sadhoo Lal v. State of M.P.*, AIR 1972 All 137, 139.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.¹²

1. **Time given for acceptance.**—An offer remains open for a reasonable time for acceptance; it becomes irrevocable after acceptance.¹³ Where a person signs an application for shares, and an allotment is made, notice of the allotment is communicated to the applicant,¹⁴ there is a completed contract and he becomes liable as a shareholder, even though a condition subsequent as to payment for the shares has not been complied with.¹⁵ Mere non-payment of the purchase money does not prevent the passing of the ownership of purchased property from the vendor to the purchaser.¹⁶ Where the plaintiff, through his vakil, made an offer that the suit might be disposed of according to the evidence of X on oath with Ganges water in his hand and the defendant's vakil accepted the offer, *held*, there was a completed contract which was irrevocable.¹⁷

An express promise to keep a proposal open for a certain length of time acquires a binding effect only when it is supported by consideration. So a proposal to sell goods giving 8 days' time for acceptance was held revocable as it was not supported by consideration.¹⁸

A party, therefore, who gives time to another to accept or reject a proposal is not bound to wait till the time expires. It is clear that a unilateral promise

12 See Halsbury, 4th ed. vol. 9 para 278.

13 See *Kashi v. Iswari*, 6 CLJ 727; see S. 4 n. 4; S. 6(2).

14 *Sadiq v. Mumtaz*, 123 IC 92.

15 *Motilal v. Thakorlal*, 36 B 557.

16 *Rajnath v. Paltu*, 5 ALJ 96; per contra *Maung Shwe v. Inn*, 15 ALJ 82.

17 *Sivaram v. Jagannath*, 55 A 298; *Bishambhar v. Thakurji*, 53 A 673.

18 *Ibid* refig to *Payne v. Cave*, 3 TR 148: (1775-1802) All ER Rep 492, bid may be withdrawn at auction before hammer falls; *Cooke v. Oxley*, 3 TR 653, offer withdrawn before expiry of stipulated time: *Routledge v. Grant*, 4 Bing 653, proposer at liberty to revoke proposal before expiry of time for acceptance; *Dickinson v. Dodds*, 2 Ch D 463, promise to keep a proposal open, unless supported by consideration, is *nudum pactum*; *Stevenson v. Mc. Lean*, 5 QBD 346, proposer not bound to wait till expiry of time given for acceptance or rejection of the proposal but can revoke it before acceptance. See *post*.

is not binding and that if the person who makes a proposal revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end.¹⁹ "Commonsense tells us that transactions cannot go on without such a rule." If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal.²⁰ Where a proposal was accepted with a material variation of certain terms and then withdrawn, though within the time fixed for its acceptance, *held*, the revocation was good and the subsequent acceptance of all the terms did not convert the proposal into a promise.¹ The acceptance of a tender qualified by conditions prevents the formation of a contract.²

2. Revocation of proposals.—An offer may be revoked before acceptance. Provisional acceptance does not make a binding contract.³ Before final acceptance of the bid or the fall of the hammer, it is always open to the bidder to withdraw his bid.^{3a} The section says that the revocation of a proposal is possible before the communication of acceptance is complete as against the proposer which, according to S. 4, means before the communication of acceptance is put in the course of transmission to him. Thus, a proposal to sell a certain property was made on the 7th. The letter of acceptance was posted on the 8th at 3-50 P.M. which reached the proposer's office at 8-30 P.M. The proposal was revoked by a letter posted between 12 and 1 P.M. which was received by the acceptor at 5-30 P.M., *i.e.*, two hours after the acceptance had been posted, *held*, a revocation of a proposal had no effect until brought to the knowledge of the acceptor, therefore, a binding contract was made on the posting of the letter of acceptance, and the revocation was too late.⁴ The rule can also be illustrated by the case of *Offord v. Davies*.⁵ Messrs Davies sent a written proposal to the plaintiff that, in consideration of the plaintiff discounting the bills of a particular firm, they would guarantee for a period of 12 months due payment of such bills to the extent of £600. Before the 12 months had expired, when some bills had been discounted and duly paid, Messrs Davies withdrew their proposal of guarantee. They refused to pay for bills discounted after the withdrawal, *held*, the revocation was a good defence to the suit on the guarantee, because the promise to guarantee by itself created no obligation, it became binding when the plaintiff acted upon it. Each bill that was discounted was to that extent an acceptance of the offer and created a liability in the proposer, but they were free to revoke their proposal except as regards discounts already made. The promise to repay for 12 months created no additional liability as it was without consideration. It meant that the proposal would lapse at the end of that period, see S. 6(2). A guarantee

19 *Adams v. Lindsell*, 1B & Ald 681.

20 *Stevenson v. Mc. Lean*, 5 QBD 846, 351; *Dunlop v. Higgins*, 1 HLC 381; 9 ER 805.

1 *Routledge v. Grant*, 4 Bing 653.

2 *Kundan v. Secretary of State*, 188 IC 597.

3 *Soma v. P. Govt.*, 1947 M 866.

3a *Linga Gowdar v. State*, AIR 1971 Mad 28, 31.

4 *Henthorn v. Fraser*, (1892) 2 Ch 27; (1891-94) All ER Rep 908. See S. 4 n. 4.

5 12 CBNS 748.

not for the supply of goods but for the payment of goods supplied takes effect only upon supply of goods, i.e., it is merely an offer. The party guaranteed is not bound to supply the goods, but if he does supply them, then he satisfies the guarantee, which becomes enforceable.⁶ Where an offer for the purchase of shares was made on the 15th and a letter of revocation was posted on the 26th, which reached the company on the morning of the 27th, but the offer had been considered by the company on the afternoon of the 26th, and a letter of allotment dated the 26th was delivered to a postman to be posted on the evening of the 27th, *held*, there was a good revocation. It is settled law that an offer is to be deemed to be accepted when the letter of acceptance is posted; the post office is to be considered the common agent of both parties. The withdrawal in order to be effectual must be before the offer is accepted by the posting of the letter of acceptance. But a postman is not an agent of the post office to receive letters and as the company received the revocation before the letter of acceptance was actually posted, the revocation must be held good.⁷ Where in pursuance of a tender notice for the sale of tendu leaves, P submits his tender but withdraws it before it is opened, the tender by P is revoked. The Government cannot take away the legal right of P by merely providing a clause in the tender notice imposing restriction on the right to revoke the tender.⁸

3. **Standing Offers: Tenders.**—A tender is not a contract but merely states the terms of an offer. The acceptance of the tender does not result in a contract. It is simply a continuing offer made by one party to the other and each successive order given, while the offer remains in force, is an acceptance of a standing offer as to the quantity ordered. It is the tender and each successive order given that constitute a series of contracts. The parties to the agreement are bound by orders actually given, but, except as to them, have full power of revocation.⁹ As has been observed, when there is an executory agreement on both sides with an option to one of the parties to do as he likes, there is nothing more in such a case than a standing offer, there is no concluded contract.¹⁰ The party accepting the tender is not bound to order all or any of the goods offered. He may buy the goods in question from any other source,¹¹ unless, as sometimes happens, the effect of the form of tender with an acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified materials from the contractor. There is an intermediate contract,¹² where the parties are not bound to any specified quantities, yet they bind themselves to buy and to pay for all the goods that

6 *Westhead v. Sproson*, 30 LJ Ex 265.

7 *Ex. p. Jones*, (1900)1 Ch 220: 69 LJ Ch 24.

8 *Rajendra Kumar v. State*, AIR 1972 MP 131.

9 *Bengal Coal Co. v. Homee Wadia*, 24 B 97; *Great Northern Ry. Co. v. Witham*, LR 9 CP 16, *refd. to in Gani v. Manilal*, 18 Bom LR 217, *Chatturbhuj Vithaldas v. Moreswar*, AIR 1954 SC 236, 238.

10 *Eagala v. Munuswamy*, 46 M 30.

11 *Secretary of State v. Madho Ram*, 10 Lah 493, 498; *Reg. v. Demers*, 1900 AC 103.

12 *Ford v. Newth*, (1901)1 KB 883: 70 LJ KB 459.

are in fact needed by them. In such a case there is a binding contract which will be broken if the purchasing body, in fact, needs some of the articles, the subject of the tender, and does not take them from the tenderer.¹³ Where the Government accepts a tender for the supply of goods and the tenderer as per tender notice offers to supply goods at specified rates as and when ordered there is a concluded contract and not a standing offer in spite of the provision in the tender notice that the Government may not purchase any of the goods when the Government also undertakes by another term not to purchase the goods from anybody also during the period of the contract.¹⁴ In order to remove ambiguity Their Lordships of the Privy Council have given a warning in these terms: "They think it right to add that in their opinion it is extremely desirable that in tenders of this kind it should be made clear, beyond all doubt, on the face of the documents whether the accepted tender is for all the supplies which may be required while the tender is in force or only for supplies as may be ordered from time to time, and that those questions should not become the subject, when differences arise, of protracted litigation".¹⁵ The period of time provided for submission of a tender is not a period after which the rights of parties are extinguished. It is only a measure of convenience.¹⁶ The local Government is empowered to frame rules under any statute making a tender irrevocable.¹⁷ Where a purchaser of immovable property undertook to reconvey it after 30 years, *held* there was a completed contract and not a mere standing offer, and that the benefit of the contract could be assigned to a stranger who was entitled to sue for specific performance.¹⁸ Acceptance of a tender may or may not amount to an acceptance in the legal sense so as to produce a binding contract. In *Union of India v. M. Thuthaiah*¹⁹ in pursuance of an invitation for tender from the M. S. M. Rly. a tenderer submitted his tender for the supply of 14,000 mds. of cane jaggery during the month of February and March 1948. Paragraphs 8 and 9 of the tender required a deposit of security and the placing of formal order. The tender was accepted by the Railway. Held that the acceptance of the tender did not amount to the placing of the order for any definite quantity of jaggery on a definite date and, therefore, did not amount to a contract.

4. Auction.—A person who makes a bid at an auction may withdraw it unless he is under a contract not to do so.²⁰ A bid at an auction is an offer and, until it is accepted, it is open to the offerer to withdraw it. "An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted by words and conduct, and bidding at an auction is a mere offer which may be retracted before the hammer is down. Such is the rule

13 *Percival Ltd. v. London, C. C.*, 87 LJ KB 677.

14 *Manickam v. State*, AIR 1971 Mad 221, 228-9.

15 *Madho Ram v. Secretary of State*, 38 CWN 294 PC.

16 *Chatterji v. Emp.*, 1946 A 416.

17 *Secretary of State v. Bhaskar*, 49 B 759.

18 *Sakalaguna v. Chinna*, 48 CLJ 125 PC.

19 AIR 1966 SC 1724.

20 *Mackenzie Lyall & Co. v. Chamroo*, 16 C 702.

with regard to auctions in general, and the same must be held to be applicable also to court auctions". In case of a conditional acceptance, approval, confirmation or acceptance has to be communicated, but need not be communicated to the bidder, who cannot withdraw his offer. A concluded contract arises on confirmation.¹ In particular cases, the fact such as a change in the circumstances during the suspension of the sale, or the possibility that the bidder has exhausted his resources in the purchase of other lots,² may justify a presumption in favour of retraction. Under S. 6, lapse of time before acceptance of a proposal, whether arising from the adjournment of auction proceedings or otherwise, is a ground for presuming revocation only when it is unreasonably long. The acceptance of a higher bid involves the rejection of a lower bid. Where the highest bidder dies after bid, during adjournment of auction sale, and the Court accepts the preceding bid, it acts with illegality and material irregularity, so that the High Court may interfere in revision.³ Every bidding may be treated as a statement made by the auctioneer, acting as agent of the vendor, that an advance has been offered to the amount of the sum bid.⁴ An auctioneer is not bound to auction things he advertises for sale, nor to indemnify a person who attends the sale on account of expenses incurred by the latter, unless the sale was advertised to be without reserve when the auctioneer is bound to sell to the highest bidder.⁵ If a sale be subject to reserve and the reserved price be not reached, yet an article be knocked down, the sale is bad.⁶ It is the accepted rule that on the fall of the hammer a contract of sale is concluded. But this is only a *prima facie* presumption, which can be set at naught by establishing a manifest intention on the part of the parties which would prevent an automatic application of the rule. In *State v. R. Ranganatham*,⁷ the plaintiff was declared to be the highest bidder at an auction sale of a forest lease held by the District Officer. The terms and conditions of the sale notification were to form part of an agreement to be executed by the purchaser. It was held that there was no concluded contract in the absence of any evidence to show that the plaintiff had received any communication about the confirmation of the bid as per terms of the sale or that he had executed any agreement as required by cl. 19.

6. Revocation how made.—A proposal is revoked—

- (1) by the communication of notice of revocation by the proposer to the other party;
- (2) by the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed, by the

1 *Agra Bank v. Hamlin*, 14 M 235; *Joravarmull v. Jeygopal*, 43 MLJ 132 see summary of the law; see n. 1; *R. V. C. Society v. Mudaly*, (1950)2 MLJ 486.

2 See *Jones v. Nanney*, 13 Price 76.

3 *Raja of Bobbili v. Suryanarayana*, 42 M 776.

4 *Mortimer v. Bell*, LR 1 Ch 10.

5 *Harris v. Nickerson*, LR 8 QB 286.

6 *Mc Manus v. Fortescue*, (1907)2 KBI.

7 AIR 1975 Mad 292; see also *State v. Hakim Singh*, AIR 1973 MP 24.

- lapse of a reasonable time, without communication of the acceptance;
- (3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or
 - (4) by the death or insanity of the proposer, if the fact of the death or insanity comes to the knowledge of the acceptor before acceptance.

1. **The section.**—The section deals with revocation of a proposal before acceptance. Before acceptance each party has the right to withdraw from the negotiation. Once a proposal has been accepted a valid and binding contract arises. If the proposer revokes the offer before acceptance clause (1) applies. If he does not, clause (2) applies unless the proposer's conduct amounts to a waiver of revocation which would follow on the lapse of a reasonable time. The various clauses of the section are independent of each other.⁸

2. **Clause (1).**—The clause lays down the rule that communication of notice of revocation of a proposal by the proposer to the other party is necessary. The time of such revocation has been stated in the previous section. The provisions of this clause are, to that extent, governed by those of S. 5. There is no doubt that an offer can be withdrawn before it is accepted and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not.⁹ But two questions arise, *viz.*, (1) whether the withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? (2) Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent? These were the two questions raised in *Byrne v. Van Tienhoven*,¹⁰ where the plaintiff, residing in New York, received an offer from the defendant at Cardiff by post on the 11th and accepted it by telegram on the same day and also by letter on the 15th. On the 18th the defendant had posted a letter of revocation of the proposal which reached the plaintiff on the 20th. With regard to the first question, the court held that an uncommunicated revocation was for all practical purposes and in point of law no revocation at all. With regard to the second question, it was held that the mere posting of the letter of revocation was not sufficient communication of it to the plaintiff, therefore it was inoperative; "both legal principles and practical convenience require that a person who has accepted an offer, not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties." Revocation or modification of an offer, therefore, can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made.¹¹ Thus, the payment of a cheque was held not countermanded

8. *Ramlal v. Malak*, 188 IC 748.

9. *Routledge v. Grant*, 4 Bing 653.

10. 5 CPD 344.

11. *Henthorn v. Fraser*, (1892) 2 Ch 27, 32; (1891-94) All ER Rep 908.

by a telegram which, owing probably to the negligence of the bank's servant, was received by the manager after the cheque had been paid.¹²

3. **Communication.**—The word 'communication' in this clause means completed communication in accordance with the terminology of S. 4. A communication of revocation of a proposal, like that of an offer itself, is complete when it reaches the other party.

4. **By the proposer.**—These words imply that notice of revocation should be communicated by the proposer or by his agent. Notice of revocation coming from a third person, therefore, will not be effective. In England a difficulty has been created by the decision in *Dickinson v. Dodds*.¹³ In that case it was held that a binding contract did not arise by the acceptance of an offer when the person to whom the offer was made got notice, not from the offerer but from an independent source, that the offer had been revoked. It laid down that no actual and express withdrawal of the offer, or what was called retraction, was necessary.¹⁴ Whatever the effect of this decision may be in English law, this section makes it clear that the notice of revocation must be communicated by the proposer himself to the other party.

5. **Clause (2).**—Where time has been fixed in a proposal for acceptance, e.g., as in *Dickinson v. Dodds*,¹⁵ where the plaintiff stated in writing, "This offer to be left over until Friday, 9 o'clock A.M., 13th July 1874", it is settled law that the proposal can be revoked as it is not supported by any consideration. The only effect of the proposal is to mark the limit of time during which it is open to acceptance unless already revoked.¹⁶ The rule is the same in the case of standing offers like continuing guarantees or tenders. Excepting so far as such offers have been already accepted, the rest is revocable.¹⁷ Where, however, no time is prescribed by the proposer his proposal is open to acceptance for a reasonable time only.¹⁸ Thus an offer to buy shares made on the 28th June was held to lapse on the 23rd of November when acceptance was signified, as the interval was not regarded as reasonable.¹⁹ It is an implied term in an offer that it shall promptly and within a reasonable time be accepted.²⁰ If there is an express refusal to accept the proposal, the proposal stands revoked.¹

6. **Without communication of the acceptance.**—This means before posting the letter of acceptance where an acceptance is to be signified by post,

12 *Curtice v. London City & Midland Bank*, (1908) 1 KB 293.

13 2 Ch D 463.

14 See *Cartwright v. Hoogstoel*, 105 LT 628.

15 2 Ch D 463.

16 *Routledge v. Grant*, 4 Bing 653.

17 *Offord v. Davies*, 12 CBNS 748; (1861-73) All ER Rep 868; *Great Northern Ry. v. Witham*, LR 9 CP 16.

18 See *Rajah of Bobbili v. Suryanarayana*, 42 M 776; see S. 4 n. 4; S. 5 n. 1; see Halsbury's *Law of England*, 4th ed. vol 9 para 1241.

19 *Ramsgate Victoria Hotel Co. v. Montefiore*, LR 1 Ex 109; *Ramlal v. Malak*, 183 IC 748.

20 *Meynell v. Surtees*, 25 LJ Ch 257.

1 *Hindustan Aluminium Corpn. v. U. P. S. E. Board*, AIR 1973 All 263, 267.

for after posting the proposer becomes bound under S. 4. It cannot mean the reaching of the letter of acceptance.

7. Clause 4.—In English law there can be no contract even by an acceptance in ignorance of the death of the proposer. Knowledge of the proposer's death before acceptance is not essential.² On the death of the proposer there can be no acceptance and the personal representatives are not liable. Thus, where A agreed with B that he would try to sell a picture belonging to B, and if he succeeded, B would pay him £100, B died before the picture was sold, *held*, the administratrix was not liable.³ An offer made to a person cannot, after the death of the offeree, be accepted by his executor.⁴ Where, however, a contract was made by a deceased tailor but the article was finished and delivered by the administrator, *held*, the sale was good and the administrator could sue for the price.⁵

7. Acceptance must be absolute.—In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such a manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

1. Acceptance to be unconditional.—Without *consensus ad idem* there can be no contract.⁶ The consideration for an object of an agreement must be something about which both sides are at one.⁷ When one party makes a composite offer, each part thereof being dependent on the other, the other party cannot by accepting a part of the offer, compel the other to confine its dispute only to that part not accepted, unless the party offering the composite offer agrees to that course.⁸ If the essential terms of a contract are settled, the contract may be regarded as concluded.⁹ An agreement to agree in the future is not a contract, nor if a material term is neither settled nor implied by law.¹⁰

2 *Carr v. Levingston*, 35 Beav 41; *Blades v. Free*, 9 B & C 167; see Halsbury's *Laws of England*, 4th ed. vol. 9 para 243.

3 *Campanari v. Mary*, 15 CB 400.

4 *Re Cheshire Banking Co.*, 32 Ch D 301.

5 *Werner v. Humphreys*, 2 M & J 853, 133 ER 989.

6 *Van Praagh v. Everidge*, (1903) 1 Ch 434.

7 *Nathusa v. Munir*, 1943 N 129.

8 *General Assurance Society v. L. I. C.*, AIR 1964 SC 892, 895.

9 *Sri Gopal v. Shashi*, 1933 C 109.

10 *Foley v. C. Coaches*, (1934) 2 KB 1; (1934) All ER Rep 88.

In order that there may be a perfectly binding contract there must be an absolute and unconditional acceptance of the terms of a proposal. Until there is an absolute and unqualified acceptance, the stage of negotiation has not been passed, and no legal obligation is imposed. What facts will constitute an acceptance, *e.g.*, on the part of insurers, will depend on the circumstances of the particular case. There must be circumstances, besides the mere acceptance of the premium, pointing to such an acceptance. It is essential that the premium should have been fixed.¹¹ There is a clear acceptance of a proposal of insurance on a company issuing a cover note and definitely promising to issue a policy within a certain time, even though the policy did not arrive when the burglary had taken place against which the insurance was effected.¹² Acceptance of an offer wrongly transmitted by the telegraph office,¹³ or by a typist,¹⁴ does not conclude a contract between the parties. There is no acceptance of an offer to sell two pieces of land by accepting the offer regarding one plot, as the offer was not divided into distinct parts.¹⁵ Where a man executed a bond, intending it to be a joint bond of himself and another, who does not execute it, he is not bound unless it is executed by the other.¹⁶ If a document evidencing a contract is executed by some only of several persons who purport to join in the contract, it constitutes only a proposed agreement; it cannot bind even those who did execute it. A decree for repayment of money lent cannot be passed where one of two executants has signed a promissory note.¹⁷ A sale deed signed by one of two intended executants cannot be sued on as the intention of the parties has not been carried out in its entirety. But it has been held that an arbitration clause in a contract may be binding upon a party who has not signed the contract.¹⁸ In *Narain v. Lala Ramanuja*,¹⁹ the Privy Council held that there was no concluded contract in the circumstances of the case but only an expectation on each side. Where A advertised for the sale of a horse, B answered the advertisement, negotiations took place resulting in B agreeing to buy the horse if a veterinary surgeon's certificate was given, the correspondence showed that a warranty had been demanded by B and given by A, and the horse proved unsound, *held*, there was a valid contract.²⁰ In order to form a contract by letter, there must be a fair understanding on the part of each as to what is to be the purchase money, how it is to be paid, and also

11 *Kwa Hai v. Northern Assurance Co.*, 83 IC 569; *Soma v. P. Govt.* 1947 M 366; *Meaney v. Wallar*, 1947 A 332; see Halsbury 4th ed. vol. 9 para 256.

12 *Muhammad v. Clive, I. Co.*, 148 IC 522.

13 *Ismail v. Short*, 8 IC 291; *Henkal v. Pope*, LR 6 Ex 7.

14 *Dunn Trust v. Feetham*, (1936) 1 KB 22; (1935) All ER Rep 280.

15 *Bhawan v. Sadula*, 20 IC 282.

16 *Underhill v. Horwood*, 10 Ves 225; (1803-13) All ER Rep 122.

17 *Ram v. Ruprao*, 64 IC 726; *Sivasami v. Sevugan*, 25 M 389; *Latch v. Wedlake*, 11 A & E 959, 113 ER 678 relied on; see S. 43 n. 1; but see *Ganpat v. Abdul*, 1937 N 54.

18 *Marha v. Muhammad*, 7 IC 393; *Hussain v. Ruiya*, 1950 B 333, 343.

19 20 A 209 PC.

20 *O'Grady v. Winn*, 9 ALJ 285.

a reasonable description of the subject of the bargain,¹ a clear accession in the correspondence on both sides to one and the same set of terms.² The mere passing of letters does not give rise to a contract.³ Of course, once it is shown in the course of correspondence that the parties have arrived at a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at,⁴ nor is a party starting fresh negotiations, on their failure, precluded from specifically enforcing the contract. If two persons execute a deed on the faith that a third will do so the contract will be binding unless substantial injustice would result.⁵ Whether an agreement is a complete bargain or merely a provisional arrangement depends on the intention of parties as discernible from the language used by them on the occasion when the negotiations took a concrete shape.⁶ Where a person, in order to settle a dispute, promised to make a grant to a boy whom he had taken in adoption, but whose adoption was invalid, *held* the declaration marked only a stage in the negotiation and there was no completed contract.⁷ Where a building work is agreed to be executed to the approval of a third person, it is not open to the employer to complain of defects in the work done after a final certificate has been granted, unless there had been fraud or collusion.⁸ In order to determine whether a contract has been concluded by the parties, the court must look not merely to the letters and the whole correspondence, but also look to the conduct of the parties.⁹ When each letter is followed immediately by another which suggests something else, as a topic of further discussion, it becomes most dangerous to draw a line after any particular letter.¹⁰ Where two letters standing alone would be evidence of a sufficient contract, but a negotiation for an important term of the purchase and sale was afterwards carried on, there was no completed contract.¹¹ A contract may be made out from correspondence. From several letters between the parties there may be extracted what will amount to an agreement.¹² Parol evidence may be given

1 *Kennedy v. Lee*, 3 Mer 441, 447: (1814-23) All ER Rep 181.

2 *Thomas v. Blackman*, 1 Coll CC 301, 302; *Gopal v. Sashi*, 60 C 111, 118.

3 *Devidatt v. Shriram*, 1932 B 291.

4 *Perry v. Suffields Ltd.*, (1916) 2 Ch 187, 192; *Bellamy v. Debenham*, 45 Ch D 481; *Bristol etc., Bread Co. v. Maggs*, 44 Ch D 616; *Radha Kishan v. Shankar*, 100 IC 422; *Mill Stores v. Mathuradas*, 57 IC 636; *Currimbhoy v. Creet*, 57 C 170, 185; *Kahn v. Jugal*, 123 IC 838; *Reliance Insee. Co. v. Duder*, (1913) 1 KB 265, 273; *Jainarain v. Surajmull*, 1949 IC FC 211.

5 *Jainarain v. Surajmull*, 1949 FC 211.

6 *Harichand v. Govind*, 47 B 335; *Gujjar v. G. G.*, 1942 Pesh 33.

7 *Dalpatsingji v. Raisingji*, 39 B 528.

8 *Baines v. Ram*, 1940 L 505.

9 *Aryodaya S. & W. Co. v. Javalprasad*, 5 Bom LR 909; *Hussey v. Horne-Payne*, 4 AC 311: (1874-80) All ER Rep 716.
70, 73; *Imam v. Rani*, 1937 N 289.

10 *May v. Thomson*, 20 Ch D 705, 723.

11 *Briston &c. Bread Co. v. Maggs*, 44 Ch D 616: 59 LJ Ch 472.

12 *Hammersley v. De Biel*, 12 Cl & F 62n, 78n; see *Bonnewell v. Jenkins*, 8 Ch D 70, 73; *Imam v. Rani*, 1937 N. 289.

to connect these letters.¹³ Whether a certain document forms part of the contract or not is sometimes difficult to decide.¹⁴ Where a contract is reduced to writing the court is not to look at the previous negotiations.¹⁵ Oral evidence is admissible to show that a document was not intended to operate as an agreement.¹⁶

It is easy enough to understand that where a proposal has been made, if the answer is equivocal, or anything is left undone, no binding contract arises, because there has been no consensus of minds. Therefore, where some of the terms of the proposal have not been assented to the minds of the parties are not *ad idem* and there can be no contract.¹⁷ Thus, where on receipt of certain proposals from A, B wrote to him "my agent will arrange matters with you if you will put yourself in communication with him," *held*, there was no acceptance of the terms proposed so as to constitute a binding contract.¹⁸ If one of the conditions essential to the implementing of an acceptance is left to the discretion of a third person, the acceptance cannot be said to be unqualified.¹⁹ Where the highest bid at an auction for the sale of a liquor shop is subject to confirmation by the Chief Commissioner no contract is formed unless the bid is so confirmed. Hence the auction purchaser will not be liable for any shortfall on re-auction taking place without the purchaser's bid having been confirmed by the Chief Commissioner.²⁰ Where bid for exploitation of forest trees is accepted by the D.F.O. subject to confirmation by the Chief Conservator, no contract emerges in the absence of such confirmation.¹ Where looking at the whole correspondence between the parties it was clear that there was never a concluded agreement as to the value of the subject-matter of negotiations, there could arise no contract of sale.² So also where an application for shares was subject to a condition, *e.g.*, of rendering service in lieu of cash payment,³ or that calls should be set off against the amount due on a building contract to be entered into between the parties⁴ the acceptance of the offer being conditional, no concluded contract arose. The phrase "awaiting detailed letter" in a telegram of acceptance may or may not become absolute acceptance depending on the facts of the particular case.⁵ Where defendants wrote in reply to the plaintiff's enquiry that the price of cocaine was Rs. 20 an ounce and added the words, "without engagement," then the plaintiff sent a sum for the purchase of cocaine, but the defendant a fortnight later intimated that they were unable

13 *Oliver v. Hunting*, 44 QBD 205.

14 *Young v. Canadian N. Ry.*, 1931 AC 83.

15 *Sewak v. Municipal Board*, 1937 A 328.

16 *Tyaga v. Veda*, 1936 PC 70.

17 *Appleby Johnson*, LR 9 CP 158.

18 *Stanley v. Dowdeswell*, LR 10 CP 102.

19 *Ara v. Dy. Commissioner*, 1941 O 529.

20 *Union of India v. B. W. Ram*, AIR 1971 SC 2295.

1 *Nilgiri Contractors' Society v. State*, AIR 1975 Or 33.

2 *Bijaya v. Secretary of State*, 150 IC 368. •

3 *Shackleford's Case*, LR 1 Ch 567.

4 *Simpson's Case*, LR 4 Ch 184; see *Re Universal Banking Co.*, LR 3 Ch 633.

5 *Meenakshi Mills v. Iyar*, 122 IC 507.

to supply cocaine at Rs. 20 an ounce and returned the money, the conduct of the defendants in receiving the sum sent by the plaintiff and crediting it to his account amounted to a definite acceptance of the plaintiff's proposal.⁶ Where on the date that an immovable property was sold a 'counterpart document' was executed providing for the reconveyance of the property after 30 years, *held*, all the elements necessary to constitute a contract were present—there was the undertaking to reconvey, the time at which the option was to be exercised, and the price which was to be paid for the property.⁷ Of course, acceptance must be by the party to whom the proposal is made. In the simple case of an offer by A to sell to B, an acceptance of the offer by C can establish no contract with A, there being no privity.⁸

2. **Counter-proposal.**—The existence of counter-proposals shows that the parties have not assented to the same terms, therefore, they prevent the formation of contract.⁹ A proposal once refused is dead and cannot be revived by its subsequent acceptance. Thus, where A offered to sell his farm to B for £1000, but B agreed to pay to £950, whereupon A refused to part with the property, but two days later B agreed to pay £1000, when A refused to sell, *held*, there was no contract.¹⁰ In response to an invitation for offers for the sale of claim against a bank, the defendant wrote to the plaintiff on the 5th offering to sell it at 14 annas per rupee and requiring the acceptance by plaintiff to be made by wire, the plaintiff on the 9th by wire accepted the offer at 13 as. 9 p.; the defendant on the 11th in reply wired, "Less than 14 as. not accepted". The plaintiff by another telegram on the 16th accepted the defendant's offer at 14 as., *held*, the telegram of the 9th rejecting the offer of the 5th was a counter-offer by the plaintiff which implied a rejection of the defendant's offer. Even if the defendant's telegram of the 11th be taken as containing an implied renewal of the offer of the 5th, the acceptance on the 16th was not made within a reasonable time.¹¹ Where a counter-proposal is not accepted by the offeree there is no concluded contract, hence no suit would lie for damages for breach of contract.¹² Where the letter accepting a tender submitted by a contractor requires the contractor to execute a formal agreement and the contractor, objecting to the terms of the formal agreement, declines to execute the formal agreement, there is no concluded contract. The letter accepting the tender is merely a counter-offer which, if not accepted absolutely, cannot result in a concluded contract.¹³

A mere inquiry, however, will not amount to a counter-proposal or rejection. An acceptance with an inquiry as to whether the terms can be varied is no bar

6 *Bishan v. Chandi*, 42 A 187.

7 *Sakalaguna v. Chinna*, 55 MLJ 198 PC.

8 *Meynell v. Surtees*, 3 Sm & G 101, 117: (1855) 25 LJ Ch 257.

9 *Lucas v. James*, 7 Ha 410; see Halsbury, 4th ed. vol 9 para 258.

10 *Hyde v. Wrench*, 3 Beav. 334: 49 ER 132; *Girdhari v. S. B. Banque*, 1988 L 341.

11 *Nihal v. Amar*, 98 IC 272.

12 *Murali v. Paresih*, 1947 C 14; *Rajkumar v. Shiva*, 1939 C 500.

13 *Union of India v. U. S. Dugal & Co.*, AIR 1972 Delhi 110.

to the formation of a contract.¹⁴ A proviso that no insurance shall be effected until the premium was paid would exonerate an insurance company from all liabilities under a policy unless the premium was paid and accepted. The fact of the executed policy having been handed over to the insured is not a waiver of the condition. The contract is not complete until the premium was paid and accepted. In *Canning v. Farquhar*¹⁵ the proposal was accepted at a specified premium, but upon the terms that no insurance should take effect till the premium was paid. Before tender of the premium, there was a material alteration in the state of health of the proposer and the company refused to accept the premium and to issue a policy, it was held that the nature of the risk having been altered at the time of the tender of the premium, there was no binding contract to issue a policy.¹⁶

Similarly where there is no acceptance *simpliciter* of the proposal, but several new terms are suggested for acceptance there is no contract.¹⁷ Thus, where A made a written proposal to B, B tendered to A an indent for signature containing terms not contained in the original proposal which A refused to sign, *held*, there was no contract.¹⁸ Where a buyer wrote in Chinese on the bought and sold notes "Yellow rice will not be accepted; will not accept it if it is wet" after the sold note had already been signed by the seller, *held*, there was no concluded contract if assent had not been given to the new term.¹⁹ If, however, there be absolute acceptance of a proposal but coupled with the addition of a new term, the term will be rejected, and the contract will remain unaffected.²⁰ A party is under no obligation to repudiate the additional term.¹ Where direction is given by the Housing Board for additional work for which no rates are fixed and the contractor informs about the rate therefor as per term and as per contract the Housing Board can cancel the order for additional work if rates are unacceptable; non-exercise of liberty to cancel does not result in an agreement as to rates proposed by the contractor.² An application for shares was accepted but the letter of allotment contained a new term, "not transferable," *held*, a new term being thus imposed there was no contract.³ Where an application for shares is accepted by the company subject to the proviso of "forfeiture if they were not paid for at a certain definite time," there is no contract.⁴

3. Acceptance with variation.—An acceptance with a variation is no acceptance; it is simply a counter-proposal which must be accepted by the original

14 *Stevenson v. McLean*, 5 QBD 346: 49 LJ QB 701; *Nirod v. Kirtyananda*, 80 IC 308.

15 16 QBD 727.

16 *South B. Insee. Co. v. Stenson*, 30 Bom LR 745.

17 *Jones v. Daniel*, (1894) 2 Ch 332: 63 LJ Ch 562.

18 *Haji Mahomed v. Spinner*, 24 B 510.

19 *Ah Shain v. Moothia*, 4 CWN 453.

20 *Sir Mahomed v. Secretary of State*, 45 B 8.

1 *Lakhaji v. Boorugu*, 181 IC 334.

2 *Bombay Housing Board v. Karbhase Naik & Co.*, AIR 1975 SC 763.

3 *Chaplin v. Clarke*, LR 4 Ex 403.

4 *Jackson v. Turquand*, LR 4 HL 305.

promisor before a contract is made.⁵ Thus a substantial variation between the prospectus and the memorandum of association will entitle an applicant for shares on the faith of the prospectus to recover back the deposit if he comes forward within a reasonable time.⁶ Where an application for shares was accepted and the applicant was asked to sign the articles of association, in default whereof the shares and deposit would be forfeited to the company," *held*, there was no contract because of the material variation between the offer and the acceptance.⁷ Where the bought and sold notes differ in any material respect there is no contract.⁸ Upon return of a draft lease executed not according to the terms proposed by the intended lessee, the contract was not complete and the lessee was at liberty to break off the negotiations.⁹ An agreement of amalgamation of two companies was embodied in an indenture in two parts which differed materially from each other, *held*, there was no amalgamation.¹⁰ An offer to buy a mare, being quiet in harness, was not accepted when sold as being quiet in double harness.¹¹ An offer made to send good barley, but assented to with the qualification that the barley is to be fine, is not an acceptance of the offer.¹² Delivery of more goods than ordered does not result in a contract, so the purchaser is free to refuse the whole lot.¹³ Thus an order for 10 hogshead of wine is not accepted by sending 15,¹⁴ but the buyer is bound to pay for the quantity retained as upon an implied contract,¹⁵ and he will be so bound in the converse case of the seller delivering only a part of the goods ordered and failing to perform the contract in its entirety.¹⁶ Where goods supplied are inferior to the contract quality, the purchaser can return them, but if he choose to keep them, he is bound to pay for them.¹⁷ There can be no implied contract where an express contract exists.¹⁸ An offer to remove silt for the ensuing year is not accepted after allowing the removal of silt up to March 31. There is no contract in such a case.¹⁹ A contract for the supply of "oil petroleum" is not discharged by the supply of petrol.²⁰ Both parties must agree upon one

5 *Haji Mahomed v. Spinner*, 24 B 510 fold in *Bhagwan Das v. Shiv Dial* 2 IC 811; *Wynn's Case*, LR 8 Ch 1002: 43 LJ Ch 138; *Peck's Case*, LR 9 Ch 392; *Meynell v. Surtees*, 3 Sm. & G. 117. (1855)25 LJCR 257; *Pacific Minerals v. S. M. Syndicate*, 1938 C 343.

6 *Downes v. Price*, LR 3 HL 343.

7 *Oriental Inland Steam Co. v. Briggs*, 31 LJ Ch 241.

8 *Gregson v. Ruck*, 4 Ad & El QB 737, 747; *Moore v. Campbell*, 10 Ex 323.

9 *Lucas v. James*, 7 Hare 410; *Smith v. Holmes*, 164 IC 292.

10 *Beck's Case*, LR 9 Ch 392; *Wynne's Case*, LR 8 Ch 1002: 43 LJ Ch 138.

11 *Jordan v. Norton*, 7 LJ Ex 281: 4 M & W 155: 1 H & H 234.

12 *Hutchinson v. Bowker*, 9 LJ Ex 24.

13 *Levy v. Green*, 28 LJ QB 319; *Jugal v. Kishori*, 74 IC 923.

14 *Cunliffe v. Harison*, 20 LJ Ex 325.

15 *Hart v. Mills*, 15 LJ Ex 200.

16 *Oxendale v. Wetherell*, 9 B & C 386; see as to the rights of the seller.

17 *W. M. Coal & Iron Co. v. Morewood*, 46 LJQB 746.

18 *Re Allison*, (1904)2 KB 827; *Ayyar v. Dist. Board*, 1941 M 887; see *Craven—Ellis v. Canons*, (1936) 2 KB 403: (1936)2 All ER 1066.

19 *Muhammad v. Municipal Committee, Gurjanwalla*, 100 IC 573.

20 *Madhoram v. Secretary of State*, 38 CWN 294 PC.

set of terms, acceptance in variation of the terms of an offer prevents contract being formed.¹ Acceptance will be deemed to be made with a variation, where the variation is in terms sufficient to change the conditions of the agreement, and the attention of the party making the offer is drawn to the variation.² Variation, however, may be immaterial or may be explained by admission of evidence.³ There is no agreement unless both parties assent to the same terms, unless the variation in acceptance can be treated as unreal.⁴ Thus, an offer of insurance "at and from" port was accepted by granting 'from' port.⁵ A stipulation that there should be 30 tins in a case is broken when some of the cases contain 24 tins and the buyer is entitled to rescind the contract when goods of both descriptions are mixed up.⁶ Where goods under a contract were to be delivered as required, and only a part of the goods delivered was merchantable, *held*, the consignee was entitled to refuse to take delivery.⁷ Where the defendant wrote to the plaintiff to send 15 or 20 bags of areca nuts at once, the plaintiff 10 days later wrote to say that he would send the goods within 15 or 20 days and after a month sent 25 bags, there was no contract.⁸ Where sealing is not essential, the mere defect in respect of the seal does not make the document for all purposes bad, even if it was intended to be under seal, specially where the document has been acted upon by the company.⁹

4. **Subject to preparation of formal documents.**—There is a large number of conflicting decisions on the effect of a contract between parties subject to the preparation of a formal document. As has been observed, "If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions, then specified or to be specified by the party making it or by his solicitor, then, until those conditions are accepted there is no final agreement such as the court will enforce".¹⁰ It is, therefore, a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties, as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognize

1 *Shackleford's Case*, LR 1 Ch 567.

2 *Proprietors &c. v. Arduin*, LR 5 HL 64.

3 *Kempson v. Boyle*, 34 LJ Ex 191.

4 *Lucas v. James*, 7 Ha 410.

5 *Colonial Insee. Co. v. Adelaide Insee. Co.*, 12 AC 128.

6 *Re Moore*, (1921)2 KB 519.

7 *Jackson v. Rotax Motor Co.*, (1910)2 KB 937.

8 *Perala v. Padmanathan*, 37 IC 792.

9 *Probodh v. Road Oils*, 34 CWN 570.

10 *Crossley v. Maycock*, LR 18 Eq 180; *Ridgway v. Wharton*, 6 HLC 238, 264, 268; *Raingold v. Bromley*, (1931)2 Ch 307; (1931) All ER Rep 822; *Wood v. Midgley*, 23 LJ Ex 553; *Harvey v. Barnard Inn*, 50 LJ Ch 750.

a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.¹¹ Where the reference to a formal stipulation is not merely formal, where it is not a mere supplemental stipulation, but the offer was made subject to it, there is no concluded contract until it is complied with.¹² Where the preparation of a formal contract is of the essence of a contract, the vendor cannot waive it as being a provision intended solely for his own benefit.¹³ Therefore, if there be a clear offer and a clear acceptance there arises a binding contract, even if the parties agree to put their agreement into due form; there is no *condition* whatever suspending the operation of that acceptance until a contract of a more formal kind has been made.¹⁴ It is well settled, on the other hand, that where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed and the contract is merged in the deed.¹⁵ Equity holds people bound by a contract which, though deficient in some requirement as to form, is nevertheless an existing contract.¹⁶ A written agreement by some parties to retire from a partnership under an indemnity against the liabilities of the partnership is enforceable notwithstanding that a more formal document was intended.¹⁷

The rule underlying these apparently conflicting decisions is whether a consensus *ad idem* has been reached between the parties on all the proposed or disputed terms, if so there is a contract. The question when a contract should be viewed as complete has to be decided in each case on its own facts.¹⁸ In other words, the question is whether the parties are still negotiating or a complete contract has been arrived at.¹⁹ A mere reference in an oral agree-

11 *Von Hotzfeldt v. Alexander*, (1912) 1 Ch 284; (1911-13) All ER Rep 148; *Rossdale v. Denny*, (1921) 1 Ch 57; *Heyworth v. Knight*, 33 LJ CP 298; *Harichand v. Gobind*, 50 IA 25; *Currimbhoy v. Creet*, 31 ALJ 611 PC; *Bijoya v. Kailash*, 46 C 771; *Subimal v. Radhanath*, 60 C 1372; *Hukumchand v. Raja Ram*, 22 ALJ 935 PC; *Chinnock v. Marchioness of Ely*, 4 DGJ & S 638; *Bonnewell v. Jenkins*, 8 Ch D 70, 73; *Brogden v. Metropolitan Ry.*, 2 AC 672, 682; *Shankar v. N. M. Co.*, 1946 PC 97; *Devi v. S. of S.*, 1941 A 377; *Chengal v. Udai*, 1936 M 752; *Amrit v. Harkisan*, 1946 B 149; *M. M. & M. Refinery v. M. S. S. I. Corpn.*, AIR 1974 Mad 39, 42.

12 *Bromet v. Neville*, 53 Sol J 321; see *Watson v. Allum*, 87 LT 547.

13 *Lloyd v. Nowell*, (1895) 2 Ch 744.

14 *Rositer v. Miller*, 3 AC 1124, 1139, 1143; *Chinnock v. Ely*, 4 DGJ & S 638; 646; *Whymper v. Buckle*, 3 A 469; *Filby v. Hounsell*, (1896) 2 Ch 737; (1895-96) All ER Rep 427; *Gibbins v. N. E. Metropolitan Asylum*, 11 Beav 1; *Heyworth v. Knight*, 33 LJ CP 298, 302; *Kuldip v. Khetrani*, 25 C 869; *Hyam v. Gubbay*, 20 CWN 66, 94; *Manickam Chattiari v. State*, AIR 1971 Mad 221, 225.

15 *Knight Sugar Co. v. Alberta Ry.*, 173 IC 88 PC; *Ralli Bros. v. Bhagwan*, 1945 L 35; *Pacific Minerals v. S. M. Syndicate*, 1938 C 343; *Lawrence v. Cassel*, (1930) 2 KB 83; (1930) All ER Rep 733, stipulation collateral to deed may be proved if deed silent.

16 *Subimal v. Radhanath*, 149 IC 1000.

17 *Gray v. Smith*, 43 Ch. D 208.

18 *Kamalambal v. Dorasami*, 56 IC 26; *Chillingworth v. Eshee*, (1924) 1 Ch. 97; (1923) All ER Rep 97; *Whymper v. Buckle*, 3 A 469.

19 *Harihar v. Kesho Prasad*, 93 IC 454, 519; *Bijoya v. Kailash*, 46 C 771.

ment to a future formal contract will not prevent a binding bargain between the parties. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. In *K. Sriramulu v. Aswatha Narayana*²⁰ there was an oral agreement between the 1st respondent and all the partners of a firm except the appellant for the sale of their shares at a specified rate. A written agreement was to be drawn in 2 or 3 days and the mode of payment was also to be settled later. The sale deeds were to be executed in three months. Held that the oral agreement constituted a valid contract which could be specifically enforced. Where, however, all the terms are not agreed upon but certain minor terms are left to be submitted to the solicitor,¹ or there is to be embodied in the formal document such reasonable provisions as the solicitor might approve,² there is no contract until the formal contract has been executed. In such a case, an acceptance subject to a proviso, e.g., "subject to suitable arrangements being arranged between your solicitors and mine," prevents a contract from being formed,³ because the proviso means what it says, the agreement is subject to and dependent upon a formal contract being prepared.⁴ Thus, in *Koylash v. Tariney*,⁵ a binding contract was not arrived at by the exchange of letters as two points were left out. A contract may be completed although its terms are to be embodied in writing and registered later on.⁶ The defendants by letter offered to sell a piece of land to the plaintiff at a certain price. The letter concluded, "There will be the usual clauses in a contract and some limitations as to the length of the title to be shown" and other minor details, *held*, there was no concluded contract.⁷ Where in an agreement for sale of land price, area of land and time for completion of sale are fixed, mere omission to settle mode of payment does not make the contract incomplete.⁸ The fact that a document does not contain all the terms of a contract is not of itself sufficient to enable a party to sue on the original consideration without producing the document.⁹

Whether or not there was a concluded contract depends upon the true construction of what the parties said or did or wrote at the time when the contract is said to have been concluded; the distinction between those cases in which it has been held that there was a concluded contract and those in which it has been held that there was none, is often remarkably fine.¹⁰ In *Badri Prasad*

20 AIR 1968 SC 1028.

1 *Winn v. Bull*, 7 Ch. D 30, fold in *Hawkesworth v. Chaffey*, 55 LJ Ch. 335.

2 *Rosdale v. Denny*, (1921) 1 Ch. 57.

3 *Lockett v. Norman*, 1925 Ch. 56; (1924) All ER Rep 216; *Honeyman v. Marryatt*, 6 HLC 112.

4 *Winn v. Bull*, 7 Ch. D 30; *Coope v. Ridout*, (1921) 1 Ch. 291; *Maung Shwe v. Tun*, 9 CWN 147 PC.

5 10 C 588.

6 *Radhakishan v. Shankar*, 100 IC 422.

7 *Rummens v. Robins*, 3 DGJ & S 88; *Sriramulu v. Aswatha*, AIR 1968 SC 1028.

9 *Maung Ko v. Lu*, 167 IC 479.

10 *Subodh Chandra v. Himanshu Bala*, 60 CWN 423, 433; *Labanya Ray v. P. M. Mukherjee*, 68 CWN 611.

v. *State of M.P.*,¹¹ the D.F.O. wrote to the plaintiff: "Kindly inform whether you are ready to pay further Rs. 17,000 for the contract of big trees of Sunderpani village . . . which (contract) is under dispute at present". The plaintiff wrote in reply, "I am ready to pay Rs. 17,000 provided my claim to have the refund of Rs. 17,000 already paid from the owner of the village or any other relief consequential to the judgment of that case remains unaffected". Held that the acceptance being conditional and qualified no contract was concluded.

5. **Subject to approval of title.**—The introduction of the words "subject to the title being approved by the solicitor" in the letter of acceptance appears to have the effect of the introduction of a new term and, therefore, the acceptance will not create a contract between the parties. The effect of the stipulation is not to give an absolute power to the solicitor to reject a title made out by the vendor, however good such a title may be. He is the sole judge provided he acts reasonably and *bona fide*.¹² It is incumbent on the vendor to establish either that the solicitor approved of the title, or that there was such a title tendered as made it unreasonable not to approve of it.¹³ On the other hand, it has been pointed out that a stipulation that the purchaser's solicitor shall approve of the title of the property need not be construed as a condition at all in some cases but may amount to a real condition in others.¹⁴ A purchaser is entitled to rescind if his solicitor's objections are proper and real and reasonable, otherwise the agreement will be binding.¹⁵ Where an agreement for the sale of a house was arrived at by letters, one of which contained the words that money would be promptly paid on approval of title by the solicitor, it was held that the contract was not conditional on the approval by the solicitor of the title, but that the approval was a condition precedent to the prompt payment of the purchase money without waiting for the conveyance.¹⁶

6. **Clause (2).**—Acceptance of an offer must be expressed and cannot be implied.¹⁷ There must be an external manifestation of assent by some word spoken or act done by the offeree which the law can regard as the communication of the acceptance.¹⁸ This marks a departure from the English law according to which an acceptance in a manner other than that prescribed by the proposer is no acceptance in law.¹⁹ Under this clause the duty is cast on the proposer to insist, if he likes, that "his proposal shall be accepted in the prescribed manner," but if he fails to do so, he is deemed to have accepted the acceptance.

11 AIR 1970 SC 406 (61C).

12 *Treacher & Co. v. Mahomedally*, 35 B 110, 117 sq.; *Clack v. Wood*, 9 QBD 276 fold.

13 *Krishnaji v. Ram*, 33 Bom. LR 1377.

14 *Von Hatzfeldt v. Alexander*, (1912) 1 Ch. 284; (1911-13) All ER Rep 148; *Re Cheshire Banking Co.*, 32 Ch. D 301; *Kamal v. Chatoorbhuj*, 78 IC 962, agreement binding.

15 *Sreegopal v. Ram*, 8 C 856; *Misri v. Netai*, 58 CLJ 513, see authorities reviewed; *Abro v. Promotho*, 18 CWN 568.

16 *Cohen v. Sutherland*, 17 C 919; *Sreegopal v. Ram*, 8 C 856 distgd.

17 *Harvey v. Facey*, 1893 AC 552.

18 *Halwell Securities Ltd. v. Hughes*, (1974) All ER 161.

19 *Powell v. Lee*, (1908), 99 LT 284; *Robophone Facilities Ltd. v. Blank*, (1966) 3 All ER 128.

though it has not been made in the manner originally prescribed by him. Silence, therefore, will be construed as acceptance. But it is well established in English law and it is good law in this country also that the manner prescribed for acceptance of a proposal cannot be mere silence.²⁰ From the mere fact that no reply has been sent to a proposal or to a counter-proposal, assent cannot be inferred.¹ No duty is cast by the law upon a person to whom an offer is made to reply to that offer. The mere fact of standing by, even though he is told that there is something done which he has not authorised, cannot fix him with liability.² "Reply by return of post" does not mean exclusively "reply by letter by return of post". A reply by telegram, or by verbal message, or by any means not later than it would take a letter sent by post to reach the destination, would equally satisfy the requisition.³ An invitation to accept an offer by the very next post is sufficiently accepted by posting acceptance on the day of receiving the offer.⁴ The despatch of a reply-paid telegram is only an intimation to the offeree that speedy information is desired by the offerer, the sending of the reply is not a condition to the validity of the acceptance.⁵

8. Acceptance by performing conditions, or receiving consideration.—Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

1. **The section.**—The law on the subject of acceptance of an offer has been indicated in Ss. 7, 8 and 9. In this section provision is made for an implied acceptance by performance of an act by the promisee. A correct interpretation of the three sections does not import into Indian law the English law as to acceptance by conduct. On an interpretation of the sections there are only three cases in which acceptance can be made otherwise than in words; one is when the promisor has specified a manner in which the proposal is to be accepted and the manner is acceptance otherwise than in words; a second is when acceptance is by performance of the conditions of a proposal: and the third is when acceptance of a proposal is by acceptance of any consideration offered for a reciprocal promise invited from the promisee. There is, however, one further case, in which there may be acceptance by conduct, which is not covered by the three sections. It is when a trade, or mercantile, or local usage

20 *Gaddar Mal v. Tata Industrial Bank*, 49 A 674; *Fairline Shipping Corporation v. Adamson*, (1974)2 All ER 967; See Halsbury, 4th ed. Vol. 9 Para 250.

1 *Haji Mahomed v. Spinner*, 24 B 510, 523-4; *Felthouse v. Bindley*, 10 WR 423; *Perala v. Padmanthan*, 37 IC 792; *Bholat v. Y. S. Bank*, 1941 R 270.

2 *Challis's Case*, LR 6 Ch. 286.

3 *Tinn v. Hoffman*, 29 LT 271.

4 *Dunlop v. Higgins*, 1 HLC 381.

5 *Read v. Anderson*, 10 QBD 100, 104: (1881-85) All ER Rep 1104.

can be invoked to import into the transaction a promise by the promisee which is made either expressly or impliedly.⁶

2. **Performance of the conditions of a proposal.**—When the proposer has invited the doing of an act in consideration of the promise made by him, the performance of the act mentioned in the proposal will amount to acceptance according to the definition of the term as given in S. 2(b), for the doing of the act implies mental assent to the proposal. What is wanting in such cases is only the formal communication of acceptance. This is illustrated in the case of a reward offered by an advertisement, where performance is expressly or impliedly indicated as the mode of acceptance. In such a case notification of acceptance need not precede the performance, but performance itself will bind the promisor. The person who makes the proposal gets notice of acceptance contemporaneously with the notice of performance of the condition.⁷ Representation as to promise to do something in future may result in contract or obligation ex-contractor. Thus if a company expands its activities on the assurance of a municipal authority that factories in a specified area within the municipality will be exempted from payment of octroi for seven years, the authority may be guilty of breach of contract if octroi is levied within this period of seven years.⁸ It is open to a party who had acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise was not recorded in the form of a formal contract as required by Art. 299 of the Constitution. Thus if the Government promises to issue import licence up to the value of the goods exported, import licence cannot arbitrarily be denied to a person who has exported goods on that promise.⁹ In the case of a public advertisement offering reward, the performance of the act raises an inference of acceptance. Where, however, a *munib* was sent to search his master's missing boy with a promise of a reward, he, being under an obligation to do the task before the reward in question was offered, was held not entitled to the reward, the performance of the act could not be regarded as a consideration for the master's promise.¹⁰ When a person, therefore, does an act which is within the scope of his employment he is not entitled to the reward offered.¹¹ Where, however, a reward was promised for information leading to the apprehension and conviction of a thief and A supplied such information, *held*, he was entitled to the reward.¹² But where under similar circumstances the criminal surrendered himself and the police officer after due enquiry arrested him, *held*, he was not entitled to the reward, because it was the criminal himself who gave the information which

6 *Gaddar Mal v. Tata Industrial Bank*, 49 A 674.

7 *Brogden v. Metropolitan Ry. Co.*, 2 AC 666, 691, fold in *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 QB 256, 269; *State of Bihar v. B. C. & P. W. Ltd.*, AIR 1954 Pat. 14; see Halsbury, 4th ed. Vol. 9, Para 252.

8 *Century Spg. & Mfg. Co. v. Ulhasnagar Municipality*, AIR 1971 SC 1021.

9 *Union of India v. Anglo Afghan Agencies*, AIR 1968 SC 718.

10 *Lalman v. Gouri*, 11 ALJ 489.

11 *England v. Davidson*, 11 A & E 856.

12 *Turner v. Walker*, LR 20 QB 301.

led to his apprehension.¹³ Where a parent promises to pay a sum to the son's wife on the day of his marriage and upon the faith of the promise the son marries, he fulfils the condition upon which the promise has been made which thereby becomes enforceable.¹⁴ Marriage is a valuable consideration for a proposal to settle property on the faith of which the marriage takes place.¹⁵ Where upon the marriage of two persons a third party makes a representation upon the faith of which the marriage takes place, he shall be bound to make good that representation.¹⁶

In the case of an auction sale without reserve there is an implied contract that the owner of the goods shall not bid, and he will be guilty of breach of contract if he bids.¹⁷ The vendor may stipulate for the power of buying in the property if it is going at a sum below what he considers a fair price. In the absence of such stipulation the vendor cannot prevent the property from going to the highest bidder.¹⁸

A time-table published by a railway company is an offer to give tickets for a train running at a particular hour to a particular place to any one who would tender the price of the ticket and a contract is established between the company and the passenger who tenders the price. The company, however, may absolve themselves from liability by the insertion of a suitable proviso.¹⁹

The transmission of a price list, however, has been held not to amount to an offer to supply an unlimited quantity of goods described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity.²⁰ So one who advertises a sale by publishing an advertisement is not responsible to everybody who attends the sale for expenses incurred in attending the sale, for every declaration of intention to do a thing does not create a binding contract with those who act upon it.¹ Similarly, advertisements for tenders have been held to be "a mere proclamation that the defendants are ready to offer the sale of the goods and to receive offers for the purchase of them," so the defendants are not bound to accept the highest tender.²

13 *Bent v. Wakefield Bank*, 4 CPDI.

14 *Mancherji v. Nusserwanji*, 20 B 8; *Shadwell v. Shadwell*, 9 CBNS 159, distigd.; *Alt v. Alt*, 32 LJ Ex. 52; see *Hammersley v. De Biel*, 12 Cl. & F. 45.

15 *Synge v. Synge*, (1894) 1 QB 466; (1891-94) All ER Rep 1164.

16 *Bold v. Hutchinson*, 20 Beav 250, 256 affmed on app. 5 DGM & G 558; *Saunders v. Cramer*, 3 Dr. & W. 87.

17 *Warlow v. Harrison*, 28 LJQB 18; (1843-60) All ER Rep 620, critised in *Main-price v. Westley*, 34 LJQB 229, but supported in *Mc. Manus v. Fortescue*, (1907) 2 KB 1; (1904-07) All ER Rep 707.

18 *Mortimer v. Bell*, LR 1 Ch. 10, see also *Halsbury's Laws of England*, 4th ed. Vol. 9, Para 231.

19 *Denton v. G. N. Ry. Co.*, 5 E & B 860; *Le Blanche v. L. & N. W. Ry.*, LR 1 CP 286; *Mc. Cartan v. N. E. Ry. Co.*, 54 LJQB 441; *Lord v. Midland Ry.*, LR 2 CP 339, 345.

20 *Grainger v. Gough*, 1896 AC 325, 334.

1 *Harris v. Nickerson*, LR 8 QB 286, furniture advertised for sale by auction but all lots withdrawn.

2 *Spencer v. Harding*, LR 5 CP 561; 39 LJ CP 332.

In the case of an offer made to an individual the same rule probably applies, e.g., an order for goods requires no communication of acceptance, the sending of the goods, without more, is an acceptance of the offer.³ So also where a surety definitely expresses his willingness to guarantee advances made to the debtor, there need be no communication of acceptance, performance of the conditions of the offer will itself amount to acceptance of the proposal,⁴ but the case is different where there is no definite proposal, and the guarantor simply says, "I have no objection to guarantee you against any loss arising from giving the principal debtor credit".⁵ Where a proposal was made by a letter to the plaintiff who accepted it by performing the condition a concluded contract arose.⁶ In a Calcutta case H invited tender for the supply of a transformer. C submitted a tender. The said tender was accepted by H. The High Court held that the acceptance of the tender by H amounted to a counter-offer by H, and that the supply of a transformer by C amounted to an acceptance of the counter-offer giving rise to a concluded contract.⁷ Of course, where instead of a definite proposal a mere expectation is held out no contract can arise.⁸

3. Acceptance of consideration for a promise.—The section also lays down that the acceptance of the consideration offered completes the contract without any notification of acceptance. Thus, where A offered to deliver certain goods to B on B's giving an indemnity and B asked for delivery of the goods, *held*, that he was bound by the contract to indemnify A.⁹ Where a bank proposed a higher rate of interest, the proposal was in effect a proposal by the bank not to demand at once the money lent and to advance further money at a higher rate of interest if the plaintiff required, the plaintiff on taking the fresh loan accepted the consideration offered by the bank, therefore, he was bound to pay the higher rate of interest. If it had not been for this acceptance of a further loan there would have been no acceptance by the plaintiff of the proposal to pay the higher rate of interest, even if the bank had intimated that in the event of its not hearing from the plaintiff acceptance would be presumed.¹⁰ Where services are rendered to a party with his knowledge and there is no objection, this amounts to their acceptance, therefore imports a promise to pay for them.¹¹ In *Venkyamma v. Appa Rao*¹² the evidence being taken as a whole and the actings of the parties being in conformity with acceptance of the promise, a concluded contract was held to arise. Whether the plaintiff is debarred from recovering possession because of his conduct in allowing the

3 *Harvey v. Johnston*, 6 CB 295, 304.

4 *Rangaram v. Raghvir*, 113 IC 780.

5 *M'Iver v. Richardson*, 1 M & Sel 557.

6 *Malraju v. Venkata*, 39 M 509 PC; *Synge v. Synge*, (1894) 1 QB 466: (1891-94) All ER Rep 1164.

7 *Heavy Engineering Corporation v. Crompton Graves Ltd.*, AIR 1972 Cal 217, 220.

8 *Maunsell v. Hedges*, 4 HLC 1039; *Narain v. Ramanuj*, 20 A 209.

9 *Dugdale v. Lovering*, LR 10 CP 196: (1874-80) All ER Rep 127.

10 *Gaddar Mal v. Tata Industrial Bank*, 49 A 674.

11 *Paynter v. Williams*, 1 Cr. & M. 810.

12 M. 509, 522 PC.

defendant to erect a substantial building at a great cost gave rise to a difference of opinion,¹³ but is now settled by a decision of the Privy Council.¹⁴

Cases of advertisements, etc., are said to be cases of contracts made with all the world, i.e., with everybody, but one cannot contract with everybody. It is really an offer made to all the world which is to mature into a contract when one comes forward and performs the condition before the offer is revoked. It is an offer to be liable to anyone who, before it is retracted, performs the condition, and although the offer is made to the world, the contract is made with that limited portion of the public that comes forward and performs the condition on the faith of the advertisement.¹⁵ A person can make himself liable to a community by agreeing to pay a certain sum of money to the community if the promise be for a consideration.¹⁶ In *Taylor v. Brewer*¹⁷ it has been held that a promise to pay a reward to deserving persons may be considered to mean, "I may or may not give anything. If I do give something I will give exactly what I deem right." On the other hand, in *Bryant v. Flight*¹⁸ some slightly different words were held to mean, "I will give you something though that something must be determined later." The principle is quite clear. Is there an unqualified contract to give something or is the option of giving anything at all left to the discretion of the proposed donor?¹⁹

9. Promises, express and implied.—In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

1. Promises, express and implied.—The section implies that there must be communication of a proposal and of its acceptance. Assent must be by express words or by positive conduct. No duty is cast by the law upon the person to whom an offer is made to reply to that offer. Although no formal document has been executed embodying the terms of an agreement between the parties, yet the course of dealing and the conduct of the party to whom the agreement was propounded may be such as to lead to the inference that the contract had been, in fact, accepted. Of course, if nothing had been done upon the footing of the agreement, silence could not have given consent in such a sense as to bind the parties on either side. A mere mental consent followed up neither by communication nor by action would not make a binding contract.²⁰

¹³ *Ramanathan v. Ramaswami*, 30 MLJI.

¹⁴ *Arif v. Jadunath*, 58 C 1235 PC.

¹⁵ *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 QB 256, 268: (1891-94) All ER Rep 127; *Spencer v. Harding*, LR 5 CP 561: 39 LJ CP 332.

¹⁶ *Narasimhulu v. Noota*, 44 MLJ 240.

¹⁷ 1 M & S 290; see *Roberts v. Smith*, 4 H & N 315.

¹⁸ 5 M & W 114.

¹⁹ *Vellayam v. Kulanda*, 29 MLJ 749.

²⁰ *Brogden v. Metropolitan Ry. Co.*, 2 AC 666, 682, 688.

A contract may be express, or implied, or of a mixed character. An express contract is to be proved by written or spoken words, an implied contract by circumstantial evidence of an agreement.¹ The difference between promises, express and implied, is that the former is made in words while the latter is made otherwise than in words. But the agreement must be one which is enforceable in law, otherwise it is no contract at all.² It has again been said that the only difference between an express and an implied contract is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. Whether the contract is proved by evidence direct or circumstantial the legal consequences resulting from the breach of it must be the same.³ In some cases promises have been partly expressed and partly implied. Thus, where parties have reduced the terms of a contract into writing the court has implied in it a stipulation, not expressed, on the ground that, though not expressed, the parties must have intended that the suggested stipulation should exist. "The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and a preventing of such a failure of consideration as cannot have been within the contemplation of either side".⁴ Again, "if a party enters into an arrangement which can only take effect by the continuance of the existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can operate",⁵ unless perhaps certain loss is the only result of continuing to act upon the arrangement in which case steps may be taken to put an end to it.⁶

There can be no implied contract between the Government and another person in view of the mandatory provisions of Article 299(1) of the Constitution.⁷

2. Implied promise.—The principle is well settled that a stipulation not expressed in a written contract should not be implied merely because the court thinks that it would be a reasonable thing to imply it. Such an implication can be made only if on a consideration of the terms of the contract the court is satisfied that it should necessarily have been intended by the parties when the contract was made.⁸ Great care must be taken by the courts to see that they do not make the contract speak where it was intentionally silent or make

1 *Sardar v. P. Z. Bank*, 1942 L 47.

2 *Meherulla v. Saraitulla*, 57 C 1093.

3 *Marzetti v. Williams*, 1 B & Ad 415, 425: (1824-34) All ER Rep 150.

4 *Hamlyn v. Wood*, (1891) 2 QB 488: (1891-94) All ER Rep 168; *Moorcock*, 14 PD 64: (1886-90) All ER Rep 530; see *Cowasjee v. Lalbhoy*, 1 B 468 PC.

5 *Stirling v. Maitland*, 5 B & S 840; (1861-73) All ER Rep 358, fold in *Ogdens v. Nelson*, (1903) 2 KB 287, on app. 1905 AC 109; see *Telegraph Co. v. Mc Lean*, LR 8 Ch. 658.

6 *Cowasjee v. Lalbhoy*, 1 B 468 PC.

7 *K. P. Chowdhury v. State of Madhya Pradesh*, AIR 1967 SC 203.

8 *Official Assignee v. Frank*, 54 M 409; *Pragdas v. Jeevanlal*, 1948 PC 217; *Denmark Production Ltd. v. Bosethal Production Ltd.*, (1968) 3 All ER 513 CW.

it speak entirely contrary to the intention of the parties.⁹ Where there is an express contract none can be implied.¹⁰

In the course of his judgment in *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.*,¹¹ Scrutton L.J. used the following oft-quoted words:—

“The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; . . .”

In a case decided by the Court of Appeal in 1960 it was agreed by a charter-party that the vessel concerned should proceed to a specified Syrian port to load a full cargo of wheat and then proceed to a port in Algeria. The vessel arrived at the Syrian port but came away without the cargo as Syrian authorities at the relevant time prohibited the export of grain to Algeria. The charterer claimed damage alleging breach of the charter-party:

The trial judge held (*inter alia*) that since it lay solely within the power of the owners, and outside the power of the charterers, to obtain the permission to load, a term had to be implied in the charter-party to give business efficacy to the contract that the shipowners would at least exercise reasonable diligence to obtain the permission.

It was, however, held by the Court of Appeal that the warranty sought to be implied by the judge was erroneous in principle, since it could not be said in the circumstances that both parties must have intended that it should be a term, or inferred what their attitude might have been had they known all the facts.¹²

The following case illustrates implied acceptance of work done during negotiation. In February 1959 the plaintiffs submitted to the defendants a tender for carrying out as sub-contractors certain engineering work and the tender contemplated variation of the work. In June 1959 the plaintiffs at the request of the defendants began to work on the project. In April 1960 the parties mutually agreed on the terms of the contract.

On the question whether there was a contract between the plaintiffs and the defendants governing their rights as to the work done since June, 1959, it was held that the parties having acted in the course of negotiations on the understanding and in the anticipation that, if and whenever a contract were made, it would govern what was being done meanwhile, the contract which came into existence in April 1960 could rightly be supported as governing the rights of the parties as to prior work.¹³

9 *Churchward v. Queen*, LR 1 QB 173, 195; *Brown & Davis Ltd. v. Galbraith*, (1972) 8 All ER 31 CA.

10 *Cutter v. Powell*, 2 Sm. LCI; (1775-1802) All ER Rep 159; *Trollope & Colls v. N. W. Hospital Board*, (1978) 2 All ER 260 HL.

11 (1918) 1 KB 592, 605, 606 CA.

12 *Compagnie Algerienne v. Katana Societa*, (1960) 2 WLR 719, 724, CA applying *Comptoir Commercial Anversois v. Power*, (1920) 1 KB 868 CA: (1918-19) All ER Rep 661.

13 *Trollope & Colls Ltd. v. Atomic Power Constructors Ltd.*, (1963) 1 WLR 333: (1962) 3 All ER 1035.

Where a term is so obviously a stipulation in an agreement that it was idle to express it by specific words, such term may be implied even though unexpressed. In this connection the following case may be considered. The plaintiff brought an action for damages for libel against the author, the publisher and the printer. As a result of negotiation between the plaintiff on the one hand and the printer and the publisher on the other it was settled that the claim in the action against the publisher and the printer would be discharged on terms. The plaintiff intended to continue the claim against the author. Neither the documents embodying the settlement nor the statement in court did specifically exclude the author, who, therefore, claimed that the action had been discharged against him as well. The court held that a term was implied that the plaintiff reserved all his rights to prosecute the claim against the author.¹⁴

In a case under the Madras Rent Recovery Act (VIII of 1865, Madras) the term 'implied contract' has been stated to be an English term of art, involving the legal incident of some consideration moving from the landlord, as that incident is understood in English law¹⁵ In *Karachi Port Trust v. Davidson*,¹⁶ the Privy Council refused to read an implied term into a contract which was silent on the point or did not clearly indicate the nature of the term. Where goods are supplied on board a ship there is an implied condition of seaworthiness which forms the basis of the contract. But when the charter-party or the bill of lading contains an express condition as to unseaworthiness, the express condition will be taken to override the implied.¹⁷ Under a contract to employ the plaintiff as a representative salesman for a period of four years, the defendant is not bound to provide the plaintiff with work,¹⁸ but in the case of a contract to sell a going business at a price to be ascertained with reference to the profit, there is an implied covenant that the business shall be continued in such a way that the purchase money to be paid for it may be ascertained.¹⁹ A customer who knows that compound interest with monthly rents has been charged impliedly agrees to pay such interest.²⁰ But the mere sending of notice by a bank to a customer that interest charged on overdraft accounts has been raised is not of itself sufficient to render the customer liable to pay the enhanced rate.¹ Wherever a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of a reward to him by the other, the law will imply a promise by each party to do what is to be done by him. Therefore, an action will lie against an innkeeper (or on his death against his executor) on his implied promise to keep safely the goods of his guest.² In case of a breach of promise of marriage the promise need

14 *Gardiner v. Moore*, (1966)3 WLR 786, 819, 820, 821: (1966)1 All ER 365.

15 *Jagaveera v. Alawarasa*, 45 IA 195.

16 22 CWN 961 PC.

17 *Burjor v. Ellerman City Lines*, 52 B 327.

18 *Turner v. Sawdon*, (1901)2 KB 653: 70 LJ KB 897.

19 *Telegraph Co. v. Mc Lean*, LR 8 Ch. 658.

20 *Haridas v. Mercantile Bank*, 44 B 474 PC.

1 *Gaddar Mal v. Tata Industrial Bank*, 49 A 674.

2 *Morgan v. Ravey*, 6 H & N 265; see *Scarborough v. Cosgrove*, (1905)2 KB 895: (1904-07) All ER Rep 48.

not be express but may be implied from the circumstances of the case.³ In the absence of an express contract there is no obligation on the part of a landlord to put premises into a habitable condition.⁴ In contracts for the sale of real estate, an agreement to make a good title is always implied, unless the liability is expressly excluded or the purchaser knew at the time of the contract that a good title could not be made.⁵ If parties to a mercantile dispute agree to refer their differences to arbitration, and in case of disagreement to the umpire, there is an implied contract by the parties jointly to pay the arbitrators and the umpire a reasonable remuneration for their services.⁶ In *Krell v. Henry*,⁷ by a contract A agreed to hire from B a flat on days on which it had been announced that the coronation procession would take place and paid a deposit. There was no express reference to the procession. As the procession did not take place A refused to pay the balance of the rent, B was not entitled to recover it, as the view of the procession was the foundation of, i.e., an implied term in, the contract. Where the act to be done by a party binding himself under a contract can only be done upon something of a corresponding character being done by the opposite party, the law will imply a corresponding obligation to do the things necessary for the completion of the contract though it be not mentioned therein in express terms.⁸ A contract to do certain work as orders should be placed does not bind the other party to place any order nor prevents him from having the work done by another.⁹ An agreement by an actor to perform at a particular theatre may imply a negative obligation not to perform elsewhere.¹⁰ Even where there is an implied request to send money by post, if the amount be large, the post is not usual means of transacting business of this nature; therefore, if the money be lost the sender is liable.¹¹ A liability to pay will arise from merely allowing a party to work when it is known that the work is not being rendered free.¹² In an agreement to repair a car there is an implied term that it will be repaired within a reasonable time and the repairer will be liable if not repaired within the reasonable time.¹³

3. Trade Usage.—When a custom or usage has become developed and has acquired a binding character it becomes by implication incorporated into transactions.¹⁴ A custom to narrow the privilege of a subject must be established

3 *Maung Shwe v. Bon*, 74 IC 128.

4 *Bijoy v. Hourah-Amta Ry. Co.*, 38 CLJ 177, see English cases referred to.

5 *Ellis v. Rogers*, 29 Cr. D 661, 670.

6 *Crampton v. Ridley*, 20 QBD 48.

7 (1908)2 KB 740, 751.

8 *Churchward v. Queen*, LR 1 QB 173, 195: 122 ER 1391.

9 *Queen v. Demers*, 1900 AC 103, refd. to in *Secretary of State v. Madhoram*, 127 IC 154; *Turner v. Sawdon*, (1901)2 KB 653; see S 5 note.

10 *Montague v. Flockton*, LR 16 Eq. 189.

11 *Mitchell-Henry v. Norwich, U. L. I. Society*, (1918)2 KB 67: (1918-19) All ER Rep 1142.

12 *Paynter v. Williams*, 1 C & M 810. See *Anson's Contract*, 17 Ed. p. 117.

13 *Charnock v. Liverpool Corporation*, (1968)3 All ER 473.

14 *Maharaja Prodyot v. Gopi*, 37 C 322.

by clear evidence.¹⁵ No hard and fast rule can be laid down regarding the period for proof of a custom.¹⁶ But, however well established a mercantile usage or practice may be, if it is contrary to natural justice, it cannot be upheld in a court of law.¹⁷ From certain casual transactions usage cannot be inferred. It must be pleaded with particularity.¹⁸

The usage, deemed incorporated by implication into a contract, must be shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it or might know it if he took the pains to enquire.¹⁹ Where the plaintiff supplies a crane on hire to the defendant on the basis of a contract over the phone and only the hiring and transport charges are agreed but nothing is said about the conditions of hire, the defendants are impliedly bound by the conditions used by all firms in the plant-hiring business.²⁰ In construing the meaning of the word 'permanent' in a contract of service, the usage prevailing in the vocation regarding age must be deemed to be part of the contract.¹ Sometimes the parties do not set down on paper the whole of their contract in all its terms, but those only which are necessary to be determined in the particular case by specific agreement, leaving to implication all those general and unvarying incidents, which a uniform usage would annex, unless they expressly exclude them. In such a case evidence of trade usage is admissible.² A person dealing with a broker has all the authority which a broker usually has in such matters, unless he has notice of the special limitation of the broker's authority.³ In a guarantee given in these terms, "in consideration of you all having at my request agreed to supply and furnish goods to C, I do hereby guarantee to you M the sum of £500", there is no implied agreement uniting the guarantee to goods supplied after it was given.⁴ The nature of the usage may become a material factor in determining whether it can be implied in a contract. Thus a stranger has been held not bound by a usage which is unreasonable or contrary to law, though it will be binding on those who know of it and desire to be bound by it.⁵ Incidents which the parties are competent by express stipulation to introduce into their contracts may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. Where the incident is of such a nature that the parties are not themselves

15 *Morgan v. Palmer*, 2 B & C 729.

16 *Kallu v. Ganeshi*, 160 IC 1098.

17 *Fazally v. Khimji*, 155 IC 801.

18 *Chettiar v. Chettiar*, 1934 R 61.

19 *Lakurka Coal Co. v. Jamnadas*, 23 CLJ 514, 543; *Volkart v. Vettivelu*, 11 M 459.

20 *British Crane Hire Corporation Ltd. v. Ipswich Plant Hire Ltd.*, (1974) 1 All ER 1059 (CA).

1 *Chilkamarri v. M. H. School*, 1941 M 788.

2 *Humphrey v. Dale*, 27 LJQB 390, fold in *Fleet v. Murton*, LR 7 QB 126: 41 LJ QB 49; *Smith v. Damodar*, 17 B 129.

3 *Hayworth v. Knight*, 33 JCP 298.

4 *Morell v. Cowan*, 8 Ch. D 166.

5 *Perry v. Barnett*, 15 QBD 388.

competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage.⁶ The general principle appears to be that in mercantile documents anyone who wants to make a stipulation derogating from the ordinary law regulating the rights of the parties must do so in clear language.⁷ In the absence of any special contract, according to mercantile usage where a dealer delivers cotton to the owner of a cotton press, property in the cotton vests in the owner of the press; therefore, where the cotton delivered is accidentally destroyed by fire, the loss naturally falls on the owner.⁸

4. **Evidence of Trade Usage.**—Under S. 92 evidence cannot be given of a custom or usage which is repugnant to or inconsistent with the express terms of the contract.⁹ An express stipulation in a contract excludes the operation of custom.¹⁰ Evidence of previous dealings is admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract is silent, or to read into it a liability which would not otherwise exist.¹¹ If the parties have used terms which have a peculiar meaning, with reference to the peculiar department of trade to which the contract relates, different from their plain and popular meaning, the parties using those words must be taken to have used them in their peculiar sense.¹² Evidence of usage is thus admitted only on the principle that the parties who made the contract were both cognisant of the usage. No such presumption arises if one of the parties be ignorant of such usage or custom.¹³ But in *Sutton v. Tatham*,¹⁴ it was held that a person who employs a broker on the Stock Exchange impliedly gives an authority to act in accordance with the rules there established though the principal may be ignorant of the rules. To constitute a usage it must apply to a place rather than to a firm or estate. Usage prevailing in a particular firm can be binding only on those who are acquainted with it and have consented to be bound by it. In order that an assignee may be bound by such usage it must be shown not only that it originally entered into and formed part of the contract but also that the assignee, and if there had been more assignments for value than one, every prior assignee, was, before he took the assignment, aware of the fact.¹⁵ Anybody setting up a local usage must allege and prove the incidents of that usage.¹⁶

6 *Crouch v. Credit Foncier*, LR 8 QB 374, 386.

7 *Venkatesa v. Parthasarathy*, 18 IC 986.

8 *Volkart v. Vettivelu*, 11 M 459.

9 *Smith v. Ludha*, 17 B 129, 140; *Abbot v. Bates*, 45 LJCP 117.

10 *Roberts v. Barker*, 1 Cr. & M. 808.

11 *Haji Mohamed v. Spinner*, 24 B 510, 525.

12 *Myers v. Sarl*, 30 LJQB 9.

13 *Kirchner v. Venus*, 12 Moo. PC 361, 399.

14 10 A & E 27; see *Norden Steam Co. v. Dempsey*, 1 CPD 654; *Robinson v. Mollett*, LR 7 HL 802, evidence cannot be given of a custom when a party is not acquainted with it.

15 *Mana Vikram v. Rama*, 20 M 275.

16 *Ragunath v. Ram*, 160 IC 8.

5. **Liability to pay interest.**—Interest cannot be claimed upon a debt due under a written instrument unless there has been either an express promise to pay interest or such promise as is to be implied from the usage of trade.¹⁷ Mercantile usage to pay interest in case of negotiable instruments has been recognised by the Negotiable Instruments Act, S. 80. Interest cannot be allowed, as a matter of course, in suits for the price of goods sold and delivered. It may be allowed where mercantile usage is proved. It may also be awarded under the Interest Act after demand,¹⁸ see S. 73, note 38. In the absence of a contract, therefore, interest cannot be granted on equitable principles.¹⁹ But an express contract is not necessary; interest may be allowed even though the agreement to pay it be only implied.²⁰ Where a transaction between the parties is of the nature of a contract or of a quasi-contract, as undoubtedly it is in the case of a buyer and a seller, the courts will be justified in allowing interest, even where there is no definite contract to pay interest.¹ Interest will be due from the date of taking possession of the subject matter of the contract and will continue until payment.² The mere circumstance of one person having moneys in his hands belonging to another, if the debt does not in its nature carry interest, will not make him liable, but agents or trustees, if they neglect to account properly, will be charged with interest on what they have retained.³

When in case of a loan there is a promise to repay the principal and interest within a certain time, such a stipulation, unless controlled by other parts of the instrument, means that interest is to run till payment.⁴ A mortgagee is entitled to the stipulated rate of interest up to the date fixed for repayment, unless the case comes under S. 74 of the Usurious Loans Act. As regards interest for the period subsequent to the date fixed for payment, when the mortgage deed is silent about the payment of interest after the due date, the correct rule is that the law raises no presumption either for or against an implied intention to pay interest after such date. The determination of the question, therefore, rests upon the interpretation of the instrument. The mortgagee may obtain it by way of damages if the stipulated rate be reasonable.⁵ No interest can be claimed under a mortgage deed which contains no provision for the payment of interest.⁶ Where a security for money payable on a certain

17 *Page v. Newman*, 9 B & C 378 approved in *London & C. Ry. v. S. E. Ry.*, 1893 AC 429; *Kripal v. Jewan*, 101 IC 644; *Madan v. Bohra*, 1934 A 115; *Jogomohan v. Kaiparechand*, 7 MIA 268.

18 *Dinanath v. Divanchand*, 32 Bom. LR 404; *Deolal v. Tularam*, 109 IC 785; *Cameron v. Smith*, 2 B & C 305.

19 *Gopalan v. District Board, Malabar*, 145 IC 476.

20 *Davindar v. Lachhmi*, 129 IC 281; *Re Duncan*, (1905) 1 Ch. 307; see *Gopal v. Badri*, 2 ALJ 3.

1 *Jagannath v. Ram*, 147 IC 342 foling *Anrudh v. Lachmi*, 115 IC 114.

2 *I. Ry. Co. v. N. P. Commission*, 1941 PC 114.

3 *Pearse v. Green*, 1 J & W 135.

4 *Mathura v. Narindar*, 19 A 39 PC overruling, 17 A 581 FB; see *Jivanna v. Appalu*, 22 M 389; *Ghantayya v. Papayya*, 23 M 534.

5 *Chirkatia v. Vithoba*, 96 IC 491; *Motan v. Muhammad*, 66 IC 771 FB; *Bhagwant v. Daryao*, 11 A 416; *Jessore Loan Co. v. Shailaja*, 59 C 722.

6 *Thompson v. Drew*, 20 Beav. 49.

day stipulates for the allowance of a certain rate of interest up to the date fixed for payment, interest at the same rate is not to be implied to be payable afterwards. The stipulated rate of interest may be adopted as a proper measure of damages for the subsequent delay, if it be a reasonable rate.⁷ The court reduced the subsequent interest on a mortgage from 6 p.c. to 5 p.c.⁸ But where the interest was 5% subsequent interest at the same rate was allowed.⁹

⁷ *Cook v. Fowler*, LR 7 HL 27 cited in *Deen Doyal v. Hetnarain*, 2 C 41, in *Nanchand v. Bapusaheb*, 8 B 131.

⁸ *Wallington v. Cook*, 47 LJ Ch. 508.

⁹ *Mellersh v. Brown*, 45 Ch. D 225.

CHAPTER II

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in *[India], and not hereby expressly repealed, by which a contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

1. The section.—A contract has been defined as an agreement enforceable in law. This section sets out the various elements which may affect the validity of a contract and thus prevent it from being legally binding or enforceable. The section has to be read along with S. 2. There must be a proposal and an acceptance of the proposal in order to constitute an agreement. Such an agreement to be legally binding, and result in a valid contract, (1) there must be free consent of the parties (Ss. 13-32); (2) the parties must be competent to contract (Ss. 11, 12); (3) the consideration must be lawful (S. 23); (4) the object must be lawful (Ss. 23-25); (5) the agreement must not be expressly declared to be void (Ss. 26-30); (6) the agreement must comply with the provision of any law requiring it to be in writing or attested or registered. These various factors, except the last, are discussed in the following sections. A fundamental term is to be distinguished from a term laying down procedure. Where a term requires the buyer to pay sales-tax, the term is fundamental. A term requiring the sales-tax to be shown separately is procedural. The buyer cannot refuse to pay sales-tax if it is not shown as a separate item.¹

2. In writing.—Agreements are required to be in writing by various statutes. The Companies Act, VII of 1913, requires the memorandum of association (S. 9), articles of association (S. 19), contracts by companies (S. 88), to be in writing. Under the Transfer of Property Act a sale (S. 54), a mortgage (S. 59), a lease (S. 107), an exchange (S. 118), a gift (S. 123), and a transfer of actionable claims (S. 130), must be in writing. Writing is also required in the case of the creation of a trust by the Trusts Act (S. 5), in the case of acknowledgements of barred debts by the Limitation Act (S. 18), in the case of a submission to arbitration by the Arbitration Act (S. 9). Certain sections of the Statute of Frauds, 29 Car II c. 3 which require certain classes of contracts to be in writing and which were in force in the Presidency towns have been repealed. The Legal Practitioners Act 18 of 1879 (S. 28) debarred a

* Substituted by Act III of 1951.

¹ *Hind Tobacco v. Union of India*, AIR 1973 SC 751.

pleader from recovering a fee from his client when no contract in writing was made;² but that section has been repealed by Act 21 of 1926 (S. 6). Every contract made by or on behalf of a District Board whereof the value exceeds Rs. 100 shall be in writing.³ There are certain contracts known as 'hedge contracts' which do not require to be in writing but full particulars must be set forth of such contracts in pleadings.⁴ Where a contract is not required to be in writing, it is immaterial whether a clause is written, printed or type-written. Where written and printed clauses are inconsistent, greater importance must be attached to the written.⁵

3. **Registration.**—S. 17 of the Registration Act 16 of 1908 mentions the documents that are required to be registered. It is not every agreement that is binding on a party to it simply because he agreed to it. Where the law says that a contract to be effective should be executed in a particular way, *e.g.*, by the execution of a registered document duly attested, those formalities cannot be dispensed with.⁶ In India there is no room for the operation of the equitable doctrine of part performance because the statute law requires "the existence of a registered document as essential for the creation of the title except as enacted in S. 53 A. T. P. Act. A vendor of immovable property, therefore, under an unregistered contract of sale cannot be treated as holding it as a trustee for the purchaser.⁷ The doctrine applies only where the contract in its own nature is enforceable.⁸ A contract for the sale of straw growing on the soil confers an interest in land and therefore requires registration.⁹

5. **Free Consent.**—Among Muhammadans marriage is a contract, and as is the case with other contracts, freedom of consent in the contracting party is one of the essential conditions of its validity. Where each of the contracting parties is *sui juris*, but the so-called consent is constrained or involuntary, the party so constrained will not be held bound by the resulting contract.¹⁰

11. Who are competent to contract.—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

1. **The section.**—In the previous section it has been stated that in order that a valid contract may be formed it is necessary, *inter alia*, that the parties

2 *Sarat v. Chundra*, 25 C 805.

3 *Roshan v. Dist. Board, Aligarh*, 58 A 40; see U. P. Dist. Boards Act, X of 1922, S. 65; *Hamidan v. Nanhe*, 1933 A 371.

4 *Harjivanlal v. Radhakishon*, 172 IC 330 PC.

5 *Bengal Agency v. Khanna*, 1949 C 231.

6 *Sohanlal v. Raghubir*, 28 ALJ 324.

7 *Official Assignee v. Moolla*, 12 R 589, *foling Ariff v. Jadunath*, 58 IA 91; *Baya v. Hla*, 1935 R 448.

8 *Medava v. Badla*, 1933 M 364.

9 *Ali v. Janabali*, 62 CLJ 534.

10 *Bindu v. Bugli*, 2 IC 814.

must be competent to contract. This section in laying down the rule as to competency mentions three kinds of disqualifications, namely, those arising from (i) minority; (ii) insanity; (iii) personal law. The section puts minors and persons disqualified by law from contracting on exactly the same footing.¹¹ A person whose property has been taken over by the Court of Wards is incompetent to contract.¹² A transaction entered into by a person who is a minor, of unsound mind, or disqualified by law, is a mere nullity in law. It cannot be turned by any legitimate process into an agreement enforceable by law. It cannot be ratified, because there is nothing to ratify. It cannot be made the subject-matter of equitable treatment. The section lays down a legal status. It enacts what a person must be in order to be capable of making any agreement recognised by law. The subsequent provisions of the Act can only apply to those who are competent to contract. The competency laid down in the section is indispensable for the formation of an agreement.¹³ The incapacity of a minor under the Indian law to bind himself or his estate by a contract is much more complete than under the English law.¹⁴

2. **Age of majority.**—The Indian Majority Act, 9 of 1875, S. 3, prescribes that in the case of persons domiciled in British India “every minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any court of justice before the minor has attained the age of 18 years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age, shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before. Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before”. Minority is, therefore, extended to 21 when a guardian, other than a guardian for the suit, of a person below 18 has been appointed,¹⁵ or of his property superintendence has been assumed by the Court of Wards.¹⁶ If a guardian has been once validly appointed or declared, the minority does not cease till the attainment of 21 years, it is immaterial whether the guardian dies or is removed or otherwise ceases to act.¹⁷

3. **Minor's contract.**—The Act makes it essential (see Ss. 2, 10, 11) that all contracting parties should be competent to contract, and expressly provides that a person, who by reason of infancy is incompetent to contract, cannot make a contract within the meaning of the Act (see Ss. 68, 183, 184). The question whether a contract of a minor is void or voidable had given rise to conflicting decisions in the past, but as the Privy Council has pointed out in

11 *Hari v. Mohammad*, 80 IC 800.

12 *Hari v. Mohammad*, 85 IC 409.

13 *Sahu v. Bajat*, 42 IC 200.

14 *Ramanathan v. Palaniappa*, 1939 M 776.

15 *Suttya v. Suttayanund*, 1 C 388; *Khwahish v. Surju*, 3 A 598.

16 *Periyasami v. Seshadri*, 3 M 11.

17 *Jaramull v. Mohadev*, 1 IC 724.

the leading case of *Mohori Bibee v. Dhurmodas*,¹⁸ the question presupposes the existence of a contract within the meaning of the Act, so it cannot arise in the case of an infant. Where a minor, therefore, purports to enter into a contract, his alleged contract is void and not merely voidable, he being a person who is not competent to contract. A minor's contract is not validated by the transfer of possession.¹⁹ Transfer of property,²⁰ or agreement to transfer property¹ by him, is on the same footing as other contracts and is void. Therefore, if, on a fraudulent misrepresentation of age, a minor borrows money on a mortgage, the deed will be void *ab initio*.² The contract to which a minor enters being void is unenforceable against the other party.³ There can be no decree against a person on a contract made during minority.⁴ Where the consideration of a bond included a sum borrowed by the mortgagor during his minority, *held*, this sum must be excluded from the amount due under the bond.⁵ A bond executed by a minor is void.⁶ An infant is not liable for a trading debt.⁷ Damages for loss of salary cannot be recovered by a minor.⁸ An attorney cannot have a personal decree against a minor for costs, but is entitled to have a charge declared on the property of the minor for his costs.⁹ An agent is not liable on a contract entered into on behalf of a principal who is a minor. The contract is wholly void.¹⁰ When a person knowingly makes a contract with minors, appointing them agents, and the contract of agency subsists for a time, the former cannot subsequently allege that the contract is void having been made with minors.¹¹ A plaintiff lending money to a minor will have to show, besides proving the fact of the loan, that the amount was really borrowed for legal and justifiable purposes as would bind the minor.¹² Where a compromise is entered into by the eldest brother of a minor as a *bona fide* settlement of a family dispute, which had been fairly arrived at and had subsequently been acted upon by all the parties, it is binding, if no specific fraud affecting the compromise is proved and if there be permission of the court to compromise the suit on behalf of the minor.¹³ It is the duty of the court to see that the

18 30 C. 539 P. C.; *Ma Hnit. v. Hashim*, 22 Bom. LR 531; *Kamta v. Sheogopal*, 26 A 342; *Gulab v. Chunni*, 122 IC 266; *Jaraomulla v. Mohadev*, 1. IC 724; *Maung Nyi v. E. E. Films*, 1939 R 266.

19 *Ghulam v. Zewaro*, 17 IC 979, 986.

20 *Shankar v. Daoji*, 61 MLJ 212, 217 PC; *India Cotton Co. v. Raghunath*, 33 Bom. LR 11.

1 *Maung Po v. Ba*, 33 IC 132.

2 *Ajudhia v. Chandan*, 1937 ALJ 688 FB.

3 *Pratap v. Sant*, 19 Lah. 313 PC.

4 *Kalipakam v. Chitoor*, 1933 M 94.

5 *Bindeshri v. Chandika*, 49 A 137.

6 *Ram v. Brijmohan*, 171 IC 96.

7 *M. U. G. Corp. v. Ball*, (1937)2 KB 498.

8 *Rajrani v. Prem*, 1949 B 215.

9 *Kumar v. Hari*, 43 C 676.

10 *Gauri v. Jawala*, 127 IC 868.

11 *Madan v. Hindu Biscuit Co.*, 4 Bom. LR 627.

12 *Vallappa v. Maruda*, 152 IC 299.

13 *Radha v. Nokhlal*, 21 ALJ 488; *Nanda v. Ram*, 41 C 990; *Himmat v. Dhanpat*, 14 ALJ 340.

interests of minors are adequately protected. When a compromise is effected to which a minor is a party, it is of considerable importance that the conscience of the court should be satisfied that the compromise is really in the interest of the minor.¹⁴ A compromise unenforceable against a minor cannot be treated as binding upon him on the ground that its being set aside would work hardship on the adult party. It is also no ground for not setting it aside that it is impossible to place the parties in the position in which they were when the compromise was effected.¹⁵ A consent decree stands on no higher footing than a contract between the parties, the court has, therefore, jurisdiction to set aside a consent decree upon any ground, such as minority of a party, which would invalidate an agreement between the parties.¹⁶ A payment by a mortgagee to a creditor who has advanced money to a minor during his infancy is a good consideration,¹⁷ though it has been decided that a mortgage executed by a person on attaining majority to pay off a debt contracted during infancy would be without consideration.¹⁸ A minor cannot be held personally responsible for the payment of debts.¹⁹ Earlier decisions which held that an infant's contract was voidable,¹ or which gave mortgage decrees for the recovery by sums advanced to minors on mortgages of house property on the representation that they were of age,² may be considered to be overruled by the Privy Council decision in *Mohori Bibee v. Dhurmodas*.³ A mortgage executed by a minor, not in his capacity as a manager of a joint Hindu family, is void as against him and his estate.⁴ Damages for loss of salary cannot be recovered from a minor.⁵ A man is not liable for inducing a minor to leave her service.⁶ A partition made during the minority of one or more of the coparceners is valid, but if the partition was unfair or prejudicial to the minor's interest he might on attaining majority by proper proceedings set it aside so far as regards himself,⁷ but inasmuch as a minor's contract is void, a partition between a father and his minor children has been held to be void.⁸ A minor, therefore, is incapable of entering into a valid contract either personally or through an agent.⁹ A minor can pay a debt incurred during minority.¹⁰ In English law it has been held that a suit does not lie for a breach of a promise to marry made by an

14 *Baroda v. Sahan*, (1937) 1 Cal 586.

15 *Sethuram v. Vasant*, 34 M 314 cited in *Suresh v. Gobind*, 103 IC 522.

16 *Ganganand v. Rameshwar*, 102 IC 449.

17 *Bankey v. Ram*, 31 ALJ 1399.

18 *Bindeshri v. Chandika*, 49 A 137; *Suraj v. Sukhu*, 51 A 164.

19 *Rajh Kocherlokota v. Maharajah Ravu*, 63 CLJ 376 PC; *Goind v. Piranditta*, 16 Lah 546; *Sant v. Partap*, 158 IC 75.

1 *Sadashiv v. Trimbak*, 23 B, see cases cited.

2 *Saral Chand v. Mohun Bibee*, 25 C 371; per contra *Sarada v. Binay*, 58 C 224.

3 30 539 PC.

4 *Balwant v. Clancy*, 34 A 296 PC.

5 *Rajrani v. Prem*, 49 B 215.

6 *Maung Nyi v. E. E. Films*, 1939 R 266.

7 *Balkishen v. Ram*, 30 IA 139; *Rahuna v. Mustafa*, 1938 R 264.

8 *Chettyar Firm v. Thaung*, 7 R 302.

9 *Perkash v. Strauss*, 109 IC 336.

10 *Anant v. Bhagwan*, 1940 A 12.

infant¹¹ unless there has been a fresh promise to marry after attaining age, as distinct from ratification of the original promise, *e.g.*, by fixing the wedding day,¹² or by such declaration as, "Now I may and will marry you as soon as I can".¹³ A minor is not competent to enter into a valid or binding contract to marry. In *Maung Tun v. Ma E*¹⁴ it was held that the contract was not binding where the promisor was a minor. The same is the result where the promisor is a major but the promisee is a minor. A minor cannot validly accept a proposal.¹⁵ These rulings accord with the principle governing a minor's contract; but in a Bombay decision,¹⁶ a minor has been held entitled to maintain a suit for damages for breach of contract of marriage made by his father during his minority.

4. Ratification.—A minor's agreement is void. Being a nullity it has no existence in the eye of law. It is, therefore, incapable of ratification,¹⁷ and cannot support a fresh promise by the infant after he has attained majority.¹⁸ Accordingly, a promissory note executed by a person on attaining majority, in settlement of an earlier one executed by him while a minor, in consideration of a sum of money received by him during minority, is bad for want of consideration.¹⁹ So also, where a minor on attaining majority executed a mortgage bond in favour of a creditor for a consideration which represented debts incurred during minority, and also a fresh advance made at the time of the mortgage, it has been held that the mortgage was enforceable only to the extent of the fresh advance, the reason being that an infant's contract being void is incapable of ratification on attaining majority.²⁰ Although there can be no ratification by an infant after coming of age he may by his conduct be bound by the alienation of his property made by his agent.¹ In *Midnapore Zemindary Co. v. Abdul*,² an infant was held estopped from challenging a sale, as he had ratified the sale by his act on attaining majority. A contract entered into by a guardian is voidable by the minor on attaining majority and not void. The minor has full power to ratify such a contract.³ Such ratification must

11 *Coxhead v. Multis*, 3 CPD 439.

12 *Ditcham v. Worrall*, 5 CPD 410, 420.

13 *Northcote v. Doughty*, 4 CPD 385.

14 14 R 215 FB.

15 *Ma Pwa v. Hmat*, 1938 Rang 617; *Ma Thwe v. Tha*, 1941 R. 179.

16 *Rose v. Joseph*, 48 B 673.

17 *Ulfat v. Gouri*, 33 A 657; *Amar v. Khudu*, 53 IC 123; *Lachhmi v. Bhagatram*, 99 IC 318; *Gouri v. Jawala*, 127 IC 868; *Gobind v. Piranditta*, 16 Lah 546 FB; *Tukaram v. Madhorao*, 1948 N 293; *Kishan v. Abdul*, 1934 Pesh. 123.

18 *Suraj v. Sukhu*, 51 A 164, see ante; *Narendra v. Hrishikesh*, 46 IC 765; *Chikhuri v. Gopal*, 75 IC 1002; *Gobind v. Piranditta*, 16 Lah. 546 FB; *Ram v. Brijmohan*, 171 IC 696; but see *Sadasheo v. Shankar*, 175 IC 494.

19 *Indran v. Anthappa*, 16 MLJ 422; *Arumugam v. Duraisinga*, 37 M 38; *Chikhuri v. Gopal*, 75 IC 1002; *Nazir v. Jiwan*, 1938 L 159.

20 *Narendra v. Hrishikesh*, 46 IC 765; *Bhola v. Bhagat*, 99 IC 318, per contra, *Narain v. Chitrangi*, 46 A 568.

1 *Chuah Hooi v. Khawsim*, 19 CWN 787 PC.

2 60 C. 753.

3 *Nandram v. Ranshoddas*, 65 IC 716; see *Gulam v. Jakir*, 1939 N 27.

be with full knowledge of his rights after attaining age,⁴ and must be intentional.⁵ The question of ratification can only arise in the case of actions of legal guardians.⁶

In a recent English case it has been held that a submission to arbitration by an infant is voidable by him and cannot effectively be ratified, except when it relates to the supply of necessities, a reasonable contract of service, or a contract plainly for the infant's benefit, and then it is binding upon him even during infancy, and quite apart from any question of ratification. Thus, where a deed of apprenticeship to which an infant is a party contains an arbitration clause, that clause cannot be treated as an independent agreement separate from the deed, and even assuming that the clause is not beneficial to the infant, he will, nevertheless, be bound by it if the agreement as a whole is for his benefit.⁷

5. **Estoppel.**—The plain statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel.⁸ The question whether a minor, who has made a false representation as to his age, is estopped from pleading his minority, was raised but not decided in *Mohori Bibe's case*.⁹ Their Lordships observed: "There can be estoppel where the truth of the matter is known to both parties, and Their Lordships hold, in accordance with English authorities, that a false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy."

In English law an infant who has made a false representation as to his age is not estopped from proving the true fact which, if such an estoppel were permitted, would deprive the infant of the protection necessary for his security.¹⁰ The proposition that there can never be an estoppel against an infant is perhaps too broadly formulated and requires qualification in case of fraud. As a general rule, however, the doctrine of estoppel is not ordinarily applicable to an infant. He cannot also be estopped by the acts or admissions of other persons.¹¹ The law of estoppel must, therefore, be read subject to other laws, such as the Contract Act, which expressly provides that he cannot be made liable in respect of a contract.¹² Where the law declares a minor's contract to be void, he cannot be made liable by virtue of an estoppel, for an estoppel cannot alter the law.¹³ A minor, therefore, who, falsely representing himself to be of age, enters into a contract, is not estopped from setting up

4 *Hari v. Sew*, 1949 Assam 57.

5 *Shadasheo v. Shankar*, 175 IC 494; *Shriram v. Mohanlal*, 1935 N 127.

6 *Karim v. Jaikaran*, 1937 N 390.

7 *Slade v. Metrodent*, (1953)2 WLR 1202, 1204: (1953)2 All ER 336.

8 *Jagarnath v. Latta*, 31 A 21.

9 30 C 539, 545 PC; see *Harnan v. Naraina*, 54 IC 876; *Bishen v. Bishna*, 69 IC 543.

10 *Stocks v. Wilson*, (1913)2 KB 235, 242; commented in *Leslie v. Sheill*, (1914)3 KB 607; (1914-15) All ER Rep 511; *Bartlett v. Wells*, 31 LJQB 57.

11 *Ram Charan v. Joyram*, 17 CWN 10, see cases discussed.

12 *Golam v. Hem*, 20 CWN 418; *Liladhar v. Piarey*, 19 ALJ 578; *Nawab Sadiq v. Jai Kishori*, 47 CLJ 628 PC; *Dhanmull v. Ram*, 24 C 265; *Gokuldas v. Golabrao*, 89 IC 143.

13 *Maung Tin v. Dun*, 99 IC 148; *Ajudhia v. Chandan*, 1937 All 860 FB.

the minority.¹⁴ A suit consequently does not lie for the recovery of money paid to him relying on such representation.¹⁵

The same question has been elaborately discussed in *Khan Gul v. Lakha Singh*,¹⁶ where it has been pointed out that there is conflict of judicial decisions on the point whether S. 115 of the Evidence Act applies to minors. In *Gadigeppa v. Balangowda*,¹⁷ it has been laid down by a Full Bench of the Bombay High Court that a minor, who by falsely representing himself to be of age has induced a person to enter into a contract, is not estopped from pleading his minority, to avoid the contract, in an action founded on the contract. The rule against the application of the doctrine of estoppel to a contract, void on the ground of infancy, has been adopted by the High Courts of Calcutta,¹⁸ of Madras,¹⁹ of Allahabad,²⁰ and of Patna¹ and by the Oudh,² Nagpur,³ Peshawar⁴ and Sind⁵ Judicial Commissioners' Courts.

6. **Restitution.**—The Privy Council has observed in a leading case⁶ that on the rescission or cancellation of a contract the court has an equitable discretion, under Ss. 38 and 41 of the Specific Relief Act, if under the circumstances of the case justice so requires, to order the return of the money obtained by the minor by fraud. This decision is authority for the proposition that the circumstances of a particular case may be such that the court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require.⁷ There is not a single case of any High Court in India where S. 65 of this Act has been applied against a minor, and a decree has been passed against him, when he is a defendant, on the ground that his contract has been void.⁸

In English law the principle has been thus laid down: "A court of equity cannot say that it is equitable to compel a person to pay any money in respect of a transaction which as against that person, the legislature has declared to

14 *Huri v. Roshan*, 71 IC 161; *Ajudhia v. Chandan*, 1937 ALJ 887 FB; *Tikki v. Komal*, 1940 N 327.

15 *Ranga v. Sait*, 67 MLJ 257.

16 9 Lah 701, 708; *Gulab v. Chunnilal*, 122, IC 266.

17 55 B 741, 33 Bom LR 1313 FB on app from 31 Bom LR 340 q.v.

18 *Dhurmodas v. Brahma Dutt*, 25 C 616, 622, affmd. on app. 26 C 381, 388, 394; *Sarada v. Binay*, 58 C 224.

19 *Vaikuntarama v. Authimoolam*, 38 M 1071.

20 *Jagarnath v. Lalta*, 31 A 21; *Radha v. Bhore*, 50 A 862.

1 *Ganganand v. Sir Rameshwar*, 6 Pat 388.

2 *Hari v. Mohammad*, 80 IC 800.

3 *Pundlik v. Bhagwant*, 96 IC 893.

4 *Kala v. Fazal*, 1941 Pesh 38.

5 *Manilal v. Kavasji*, 9 IC 124.

6 *Mohori Bibee v. Dhurmodas*, 30 C 539 PC, money not ordered to be refunded in this case.

7 *Dattaram v. Vinayak*, 28 B 181, 190; *Muhammad v. Bishambhar*, 45 A 644; *Raghunath v. Dhonde*, 64 IC 771; *Rang v. Mahbub*, 54 IC 25; *Koduri v. Thummuluri*, 94 IC 853; *Hari v. Dulu*, 61 C 1075; *Gulab v. Chunnilal*, 122 IC 266.

8 *Ajudhia v. Chandan*, 1937 All 880 FB.

be void."⁹ This has been explained to mean that in the absence of fraud an infant is not estopped from pleading minority in answer to a suit for the return of the money advanced to him during minority. Where a minor has obtained money by misrepresenting his age, that amounts to fraud and he may be made to refund it, but it is now settled that, in the absence of fraud, he cannot be ordered to do so.¹⁰ So also where a minor representing himself to be of age collected rents and gave receipts, he was held estopped by his conduct from recovering again the money once paid to him by instituting a suit through his guardian.¹¹ Similarly it has been held that a minor, who has by false and fraudulent misrepresentation as to his age induced others to purchase property from him, is liable in equity to make restitution to the purchaser for the benefit he has obtained before he can recover possession of the property sold.¹² The law has been thus succinctly stated. An infant is not bound by his contract at law, even if he induced the other party to enter into the contract by a fraudulent representation that he was of age; but in equity the view has been taken that if an infant be old enough to commit a fraud by inducing others to think that he is of age, he cannot take advantage of it, and, if the court cannot restore the parties to their original footing, the infant will be bound as if he were an adult. A false representation of age must, in order to create the liability, be an express representation and will not be constituted by mere inferences suggested by, or drawn from, the infant's conduct. Merely allowing another person to deal with him as if he were an adult, or merely doing acts which only an adult can properly do, is not sufficient. A false representation of age may not be a fraudulent misrepresentation.¹³ In *Saradaprasad v. Binay*,¹⁴ a mortgagee of the estate of a minor was held not entitled to compensation from the purchaser of the estate from the minor after he had attained majority, because no compensation could have been recovered from the minor himself. Although, therefore, an infant will not be allowed to take advantage of his own fraud and may be compelled to make specific restitution, when that is possible, of anything he has obtained by deceit, no suit to recover money obtained by an infant upon a false representation of his age is maintainable.¹⁵ Of course, where a minor has not himself received any advantage he cannot be ordered to restore anything to the plaintiff.¹⁶ A lease to a minor is void.¹⁷ Where under a contract for the hire of a house an infant undertook to pay the defendant a sum of money, paid a part and gave a promissory note

9 *Thurstan v. Nottingham & C. Society*, (1902) 1 Ch 113; (1900-03) All ER Rep 830; *Bishen v. Bishna*, 69 IC 543; *Janardhan v. Vishawanath*, 98 IC 650 referring to *Muliabai v. Garud*, 53 IC 65; *Dhanmull v. Ram*, 24 C 265.

10 *Vaikuntarama v. Authimoolam*, 38 M 1071; *Kelvi v. Asha*, 60 IC 519; *Tikki v. Komal*, 1940 N 327.

11 *Ram Ratan v. Shew Nandan*, 29 C 126.

12 *Jagarnath v. Lalla*, 31 A 21.

13 *Ganganand v. Sir Rameshwar*, 102 IC 449.

14 58 C 224.

15 *Dhanmull v. Ram*, 24 C 265, infant made liable for costs.

16 *Manilal v. Kavaji*, 9 IC 124.

17 *Pranila v. Jogeshwar*, 3 Pat LJ 518; *Lempriere v. Lange*, 12 Ch D 676; per contra *L. & N. W. Ry. Co. v. M' Michael*, 20 LJ Ex 97.

for the balance, *held*, the promissory note should be cancelled and the contract set aside, but the infant's claim for the refund of the money paid was not allowed.

When an infant has been paid something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid.¹⁸ Money paid to an infant cannot be recovered.¹⁹ An infant buying shares in a limited company and continuing to receive dividends after attaining majority is liable as a shareholder.²⁰

In *Leslie v. Sheill*,²¹ the law has been thus laid down: One cannot make an infant liable for the breach of a contract by changing the form of action to one *ex delicto*.¹ No action of deceit lies against an infant for fraudulent misrepresentation of his age, "this protection was to be used as a shield not as a sword"; an infant, therefore, is liable in tort but not on an improvident contract.² Where an infant obtained an advantage by falsely stating himself to be of age, equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of fraud. Restitution stopped where repayment began. This doctrine has been held to be applicable in India.³ But as stated in *Mohori Bibee's case*,⁴ in appropriate cases the courts in this country are empowered to order restitution by minors on equitable grounds. The minor's liability, however, arises not *ex contractu* but on equitable considerations.⁵ In *Khan Gul v. Lakha Singh*,⁶ the Lahore High Court has refused to draw any distinction between restitution of property in specie and refund of money, as the discretion given to Courts in India under Ss. 39 and 41 of the Specific Relief Act is absolutely unfettered. Materials should be placed before the Court for coming to the conclusion that justice requires it to order to refund of the money by the minor; in the absence of such material it is not possible for an appeal court to entertain such a question.⁷ The Calcutta High Court has, however, observed that it is well settled that a plaintiff who lends money to a minor cannot base his claim for restitution under S. 65, he is not entitled to get any compensation under S. 41 Specific Relief Act,

18 *Valentini v. Canali*, 24 QBD 166: (1886-90) All ER Rep 883.

19 *Tikki v. Komal*, 1940 N. 327.

20 *Fazulbhoy v. Credit Bank*, 39 B 331; see *Steinberg v. Scala*, (1923)2 Ch 452, 458: (1923) All ER Rep 239.

21 (1914) 2 KB 607, 612 sq., *refd. to in Mahomed v. Yeoh*, 43 IA 256; *Radhe v. Behari*, 40 A 558.

1 *Burnard v. Haggis*, 32 LJ CP 189, cited in *Khan Gul v. Lakha Singh*, 9 Lah 701, 714; *Ajudhia v. Chandan*, 1937 All 860 FB.

2 *Jennings v. Rundall*, 3 TR 335.

3 *Mohomed v. Yeoh*, 43 IA 256, 263-4; *Kalipakam v. Chittoor*, 1933 M 94.

4 30 C 539 PC.

5 *Manmatha v. Exchange Loan Co.*, (1937)1 Cal 283.

6 9 Lah 761, 716, *fold in Nagash v. Fateh*, 111 IC 344.

7 *Kamta Prasad v. Sheo Gopal*, 26 A 342; see *Pundlik v. Bhagwant*, 96 IC 898.

and the minor is not liable in tort.⁸ In spite of the observations of the Lahore High Court, the view prevails that the doctrine that a minor may be compelled to refund the benefit received by him, when any of his transactions is declared to be null and void at his instance, is only applicable to suits for possession so far as immovable property is concerned.⁹

Where a minor sells property by deliberately misstating his age, he will not be entitled to recover the property without refunding the amount received.¹⁰ Where any property is in the possession of the minor, which he has received in consideration of the agreement, whether that part is in specie, or even in funds, earmarked or otherwise easy of identification, the Court will compel him to restore such property whether the representation of the minor is fraudulent or not. Where there are no goods in specie or capable of identification, the Court will not compel him to make necessarily compensation in part or in whole to the other contracting party.¹¹ But in *Gulabchand v. Chunilal*,¹² the opinion has been expressed that a minor borrowing money cannot be ordered to refund it, but restitution of property obtained by a minor on a fraudulent representation of his age may be ordered. A contract by a minor is void *ab initio* and the question of rescinding the contract under S. 38, or of cancelling the instrument under S. 41 of the Specific Relief Act, does not really arise in such cases; no relief can, therefore, be granted under those sections. The law is the same in the case of contracts of insane persons.¹³

It has, however, been pointed out¹⁴ that "wherever the infant requires as a plaintiff the assistance of any court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner." But he cannot be made to repay money which he has spent. On the other hand, no question of equity arises where the mortgagee is himself seeking for the recovery of the debt.¹⁵

7. **Specific performance.**—The minor's contract being void the agreement itself is a nullity, so no question of specific performance can arise. But if a contract be entered into on behalf of an infant by one who is competent to act, *e.g.*, a certificated guardian, and the contract be for the infant's benefit, specific performance will be allowed.¹⁶ Similarly, it has been held that a contract made by the managing member of a joint family can be specifically enforced, even if there are minor members in the family, provided the transac-

⁸ *Hari v. Dulu*, 61 C 1075.

⁹ *Manak v. Madan*, 167 IC 367.

¹⁰ *Appaswami v. Narayana*, 54 M 112.

¹¹ *Huri v. Roshan*, 71 IC 161, 164, 170; *Ajudhia v. Chandan*, 1937 All 860 FB.

¹² 122 IC 266.

¹³ *Doulatuddin v. Dhaniram*, 32 IC 804.

¹⁴ *Leslie v. Sheill*, (1914) 3 KB 607, 626; (1914-15) All ER Rep 511; *Liladhar v. Piarey*, 19 ALJ 578.

¹⁵ *Ajudhia v. Chandan*, 1937 ALJ 688 FB.

¹⁶ *Etwarai v. Chandra*, 10 CWN 763; *Baburam v. Saidunnissa*, 35 A 499; *Innatunnissa v. Janaki*, 22 CWN 477.

tion, if complete, would have bound the minors.¹⁷ A minor member of a joint family on attaining age may sue for specific performance of a contract for sale of land entered into by the *karta* of the family.¹⁸ Want of mutuality is a bar to the specific performance of an executory contract entered into with a minor, but it is not a good plea to a suit for rent where the contract is executed, i.e., possession has been given to the lessee.¹⁹ Where the contract is to the detriment of a minor it cannot be specifically enforced.²⁰ The Privy Council¹ has held that a suit does not lie for specific performance of an arrangement entered into by the natural guardian of an infant for the sale of immovable property to the infant during his minority. It is not within the competence of the guardian of a minor to bind the minor by a contract for the purchase of immovable property and the minor cannot obtain specific performance of the contract,² unless perhaps the contract is for the minor's benefit.³ There cannot be a decree for specific performance against an adult member's share of the property where the alienation was of his share as also of that of a minor coparcener.⁴

8. Conveyances in favour of minors.—Although a sale or mortgage of his property by a minor⁵ or lunatic⁶ is void, a duly executed transfer by way of sale or mortgage in favour of a minor who has paid the consideration money is not void but is enforceable by him or by any other person on his behalf. The principle underlying the rule is that while no disability can be incurred by a minor, he is not debarred from acquiring a title to anything valuable.⁷ The law does not regard a minor as incapable of accepting a benefit. Thus he may take a gift which implies acceptance, or become a trustee which similarly requires acceptance.⁸ He may accept a share in a partnership.⁹ He has accord-

17 *Thakur v. Mehtab*, 68 IC 346 refd. to in *Jagdeo v. Bisambhar*, 171 IC 654; *Jatadhari v. Kishun*, 1950 Pat 535.

18 *Kona v. Drona*, 1937 M 869.

19 *Om v. Daulat*, 126 IC 190.

20 *Chhitar Mal v. Jagannath*, 29 A 213.

1 *Mir Sarwarjan v. Fakhruddin*, 39 C 232 PC; *Rambilas v. Lokenath*, 1949 Pat 405.

2 *Surajmal v. Pandhari*, 41 IC 45; s. 21 Specific Act.

3 *Hari v. Kaula*, 40 IC 142; *Dhapa v. Rao*, 1934 A 1019.

4 *Lumley v. Ravenscroft*, (1895) 1 QB 683.

5 *Laekhmi v. Bhagatram*, 99 IC 318, referring to *Ulfat Rai v. Gouri Shankar*, 38 A 657; *Munni v. Madan*, 38 A 62; *Narain v. Dhanias*, 38 A 154; *Muniya v. Perumal*, 37 M 390; *Balkishna v. Lakhu*, 68 IC 191; *Subba v. Guruva*, 120 IC 77; *Raghunath v. Muhammad*, 30 IC 200; *India Cotton Co. v. Raghunath*, 33 Bom LR 111; *Thakar v. Putli*, 5 Lah 317; *Bharat v. Jainarain*, 25 ALJ 1102; *Bahaluddin v. Rafaqat*, 18 IC 451; *Raghava v. Srinivasa*, 40 M 308 FB overruling *Navakotti v. Logalinga*, 33 M 312; *Madhab v. Baikuntha*, 52 IC 338; *Rangarazu v. Basappa*, 24 MLJ 363; *Hari Mohan v. Mohini*, 22 CWN 130; *Collector of Meerut v. Lala*, 1945 A 156.

6 See *Ellammal v. Venkata*, 79 IC 958.

7 *Laekhmi v. Bhagat*, 99 IC 318; see cases refd. to. *Karam v. Basant*, 11 IC 321 doubted; *Abdul v. Piars*, 16 Lah 1.

8 Transfer of Property Act, Sec. 127, 10.

9 Partnership Act.

ingly been held capable of accepting a promissory note.¹⁰ A mortgage bond executed by a person of full age in favour of minors as a security for a loan is not void and can enforce at their instance.¹¹ A lease to a minor has been held to be void,¹² so also a sale of property by the father to his minor son.¹³ A mortgage made in favour of a joint family is not void because it happens to be executed in the name of a member of the family who at the time of the execution of the mortgage was a minor.¹⁴ When a minor has performed his part of a contract for sale and has delivered the goods, he is entitled to maintain a suit for the recovery of their price.¹⁵ Minors have been held entitled to recover from the vendor the purchase money paid by them on their being ousted from possession by third parties.¹⁶ But an agreement to buy, where there has been no transfer of the property, is not binding on the minor, so it cannot be enforced by the vendor.¹⁷ The reason has been thus explained. An agreement as defined in S. 2 (e) does not necessarily consist of a set of promises forming the consideration for each other. If the consideration for the promise of an adult be a reciprocal promise by the minor, the agreement is void; but if the consideration for it be something that is actually done, there is no reason why the result should not be a valid contract.¹⁸

9. Powers of guardians.—The rule of law is firmly established that a minor is not competent to make a contract, and a person who is neither appointed the guardian by any court, nor could claim that status under the law applicable to the minor, cannot enter into a valid contract on his behalf. Such a transaction, if entered into, cannot be upheld as a family settlement.¹⁹ A *de facto* guardian cannot start a new business on behalf of the minor as it is sure to impose liability on the minor.²⁰ It is beyond the power of a natural guardian to impose a personal liability on the ward by a contract or a covenant to charge the property of the ward.¹ Fathers and mothers are the only natural guardians of minors.^{1a} A minor is not liable on a promissory note executed by the guardian unless there was a real necessity for its execution or the agent was acting for the benefit of the minor's business.² Minors cannot enter into

10 *Rangrazu v. Basappa*, 24 MLJ 363; *Sharfath v. Noor*, 76 IC 810.

11 *Bhaggabhor v. Mohini*, 33 IC 994; *Hanmant v. Jayarao*, 13 B 50; *Satyadeva v. Tribeni*, 161 IC 579; *Raghava v. Srinivasa*, 40 M 308.

12 *Pramila v. Jogesher*, 3 Pat LJ 518; see ante; *Satyadeva v. Tribeni*, 161 IC 579.

13 *Muhammad v. Mohammad*, 10 C 906.

14 *Meghan v. Pran*, 30 A 63.

15 *Abdul v. Piare*, 16 Lah 1.

16 *Walidad v. Janak*, 35 A 370.

17 *Maung Aung v. Gyi*, 32 IC 638.

18 *Satyadeva v. Tribeni*, 161 IC 579.

19 *Pratap v. Sant*, 19 Lah 313 PC; *Hari v. Sew*, 1949 Assam 57.

20 *Jaykant v. Durgashankar*, AIR 1970 Guj 106, 108.

1 *Waghela v. Shekh Mastudin*, 11 B 551; *Kashi v. Akhileshwari*, 58 IC 22; *Swarath v. Ram*, 47 A 784; *Imperial Bank v. Veerappan*, 67 MLJ 573, but see *Nandram v. Ranchoddas*, 65 IC 716; *Lornie v. Sait*, 1939 M 414; *Margaret v. Abu*, 1939 M 414; *Krishna v. Rishabha*, 1939 N 265.

1a *Khem v. Dayaram*, 1941 S. 50.

2 *Satyamarayana v. Mallappa*, 68 MLJ 540; *Mohan v. Vinayak*, 1941 N 251.

a contract of partnership; when they have entered into such a contract through their guardians the contracts are void.³ A *de facto* guardian of a Muhammadan minor has no power to convey the minor's share,⁴ but that of a Hindu minor can convey it for legal necessity.⁵ When a guardian enters into a contract and incurs obligations thereby in respect of the estate of the ward, neither the estate, nor the minor on attaining his age, is liable on such a contract, though it may be that between the guardian and the infant the former may in a fit case show that the estate ought to bear the burden.⁶ Thus, in the case of a loan under a promissory note executed by the mother and guardian of a minor, the lender must prove that the sums were borrowed for legal and justifiable purposes as would bind the minor, and a lender should make a *bona fide* enquiry as to the necessity of the loan in order to discharge the onus which rests on the lender. S. 25 (3) has no application to a case where a debt is not binding on the minor and is not enforceable against him.⁷ Where a mortgage that is effected of the property of a minor is not the mortgage for which leave was given by the court, the mortgage is voidable.⁸ A *de facto* guardian cannot bind the minor by a settlement which robs the minor of a large part of his property.⁹

Where the sale of immovable property by the manager results in a benefit to the minor,¹⁰ or the act is such as the infant might reasonably have done for himself, if of full age,¹¹ or there is necessity for the loan,¹² the infant is bound. A contract entered into on behalf of a minor by his guardian and for the minor's benefit is binding; the minor being the person for whose benefit the contract was made he is entitled to sue on the contract.¹³ Where the properties solely belonging to a minor were mortgaged by his guardian for the purpose of discharging a money decree against the minor and his guardian jointly and severally and the minor received the benefit only as to half the amount, his liability would be limited to that extent.¹⁴ An option to renew in connection with a lease of land granted by the uncle to his minor nephew is void.¹⁵ Payment of an unenforceable debt on behalf of a minor cannot be regarded as beneficial to the minor and does not justify an alienation of his property by

3 *Durga v. Akkari*, 1949 C 617.

4 *Abdul v. Muhammad*, 78 IC 483; *Rang Ilahi v. Mahbub*, 94 IC 25; *Gulam v. Jakir*, 1939 N 27.

5 *Tulsidas v. Vaghela*, 57 B 40 FB.

6 *Watson v. Sham Lall*, 15 C 8 PC; *Indur v. Radha*, 19 C 507 PC; *Ramajogayya v. Jagannadhan*, 42 M 185 FB; *Swarath v. Ram*, 47 A 784; *Meenakshi v. Ranga*, 130 IC 383.

7 *Valiappa v. Maruda*, 152 IC 299, see as to application of S. 20 Limitation Act.

8 *Hridoytara v. Srinath*, 19 IC 624.

9 *Sant v. Partap*, 158 IC 75.

10 *Bhagwat v. Anandrao*, 86 IC 515; *Mg Po v. Baw*, 13 IC 373; *Hemraj v. Nathu*, 59 B 525.

11 *Dullehand v. Soni*, 90 IC 239.

12 *Adhar v. Kirtibash*, 6 IC 638.

13 *G. A. Insurance Co. v. Madanlal*, 59 B 656.

14 *Chinnathambi v. Appavoo*, 90 IC 1031.

15 *India Cotton Co. v. Raghunath*, 33 Bom LR 111.

the guardian.¹⁶ But on a bond executed by a widow acting for herself and as guardian of her minor son for the payment of her deceased husband's debts, a decree can be passed against the estate of the minor.¹⁷ Where the mother of certain minors executed a bond on her own behalf and on behalf of her minor sons for a debt which was barred by time, the minors were held not bound by the bond.¹⁸ If an administrator sells the property of the minor heir of a deceased person the sale is altogether void,¹⁹ so also a sale by the step-mother to satisfy a mortgage executed by her deceased husband.²⁰ The law has been settled by the decision of the Judicial Committee in *Mir Sarwarjan v. Fakhruddin*¹ to the effect that it is not within the competence of a manager of a minor's estate, or within the competence of a guardian of a minor, to bind the minor or his estate by a contract for the purchase of immovable property. An infant is liable to indemnify the guardian for costs properly incurred in litigation.² The remedy of the creditor is against the guardian personally.³ It is not necessary that a minor should, on attaining majority, institute a suit to set aside a transfer effected by his guardian; it is sufficient if he declares his will to rescind the transaction by way of defence when an action is brought to enforce the transfer against him.⁴ As to the powers of a guardian appointed under the Bombay Minor's Act, 20 of 1864, see *Maharana Ranmalsingji v. Vadilal*.⁵

A compromise by a guardian of a minor of a doubtful claim which is not in any way to the detriment of the minor would be binding upon him.⁶ But a compromise resulting in the relinquishment of a claim of a joint family which includes minors against a person who has been ordered to make certain payments by court is not binding on the minors if made without the sanction of the court.⁷ A minor being admitted to the benefit of a partnership has been explained to mean that a *karta* cannot create a liability on the property of the minor other than his share in the assets of the partnership.⁸ A contract entered into on behalf of a minor by his *de facto* and not *de jure* guardian is voidable and not void.⁹ There is no general rule of law which justifies an inference that a guardian, entering into a contract on behalf of a minor son, renders himself liable as surety, in the absence of an express stipulation to that effect; nor does any presumption arise in such a case that the guardian makes himself

16 *Karman v. Fazal*, 95 IC 105; *Gunni v. Dulchand*, 133 IC 419, 423.

17 *Lalchand v. Narhar*, 89 IC 896; *Siva v. Kamakhya*, 23 IC 877.

18 *Medilal v. Ram*, 152 IC 466.

19 *Ma Nyi v. Myat*, 50 IC 324.

20 *Re Rama*, 15 IC 678.

1 39 C 232 PC; see *Raghunath v. Ravuthakanni*, 1938 Mad 928.

2 *Steeden v. Walden*, (1910)2 Ch 393; (1908-10) All ER Rep 380.

3 *Margaret v. Abu*, 1939 M 414.

4 *Jai Narain v. Bechoo*, 1938 A 369.

5 20 B 61.

6 *Karam v. Chuni*, 144 IC 465; *Venkatagiri v. Subbarayali*, 24 IC 491.

7 *Venkata v. Tuljaram*, 20 ALJ 833 PC.

8 *Inspector Singh v. Kharak*, 26 ALJ 577; *Ramdin v. Manoo*, 51 A 1027.

9 *Om v. Daulat*, 126 IC 190.

personally liable.¹⁰ A minor is not liable to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immovable property entered into by his guardian on his behalf.¹¹

10. Minor and adult.—Where in compromise of a suit a minor and an adult entered into a bond, by which they agreed to pay a certain sum to the plaintiff, it was held the bond was not enforceable against the minor but the adult executant was liable for the full amount.¹² On a lease being executed in favour of two persons, one major and the other minor, in equal shares, the major was held entitled to sue, the contract being divisible.¹³ Where a joint Hindu family consists of major and minor brothers, the alienation of the joint ancestral property during the minority of some of the members of the family by a manager for the payment of a time-barred debt due from the deceased father is unjustified.¹⁴

11. Liability in tort.—An infant is liable for torts. He cannot be made liable for the breach of a contract by changing the form of action to one *ex delicto*,¹⁵ i.e., he cannot be made liable in tort where the cause of action is substantially founded on contract.¹⁶ A promise to pay a sum of money on attaining majority for a liability arising out of a tort committed during infancy is binding.¹⁷ Where a suit against father and minor sons was not for damages but for wrongful misappropriation of goods a decree cannot be passed against the minors.¹⁸

12. Personal disqualification.—In India the capacity of a woman to contract is not affected by her marriage.¹⁹ A Hindu female is not on account of her sex absolutely disqualified from entering into a contract. Where she enters into a contract with the consent or authority of her husband, she acts as his agent and binds him by her act. So also does she bind him by her contract under certain circumstances. If, however, she enters into a contract in the absence of such consent or circumstances, she fails to bind her husband by her act. A wife who has voluntarily separated from her husband, without any circumstances justifying her separation, is liable to the extent of her *stridhan* for a debt contracted by her, even for necessities.²⁰ A married woman is free to contract without the consent or concurrence of her husband, and he is not liable on a contract entered into by her, except where she had express authority from her husband or under circumstances of such pressing necessity

10 *Sabir v. Farzand*, 50 A 401; see *Maida v. Kishan*, 56 A 997.

11 *Raghnathan v. Ravuthakanni*, 1938 Mad 928.

12 *Jamna Bai v. Vasanta*, 39 M. 409 PC; *Durga v. Akkari*, 1949 C 617; *Daw v. Nyi*, 1938 R 359.

13 *Rupchand v. Fazal*, 41 IC 70.

14 *Gunni v. Dalehand*, 133 IC 419, 423.

15 *Burnard v. Haggis*, 32 LJ CP 189 cited in *Khan Gul v. Lakha*, 9 Lah 701, 714.

16 *Jennings v. Rundall*, 8 TR 335; *Cowern v. Nield*, (1912)2 KB 419; (1911-13) All ER Rep 425.

17 *Re Seager*, 60 LT 665.

18 *Bharosa v. Jhauri*, 1936 P 428.

19 *Kanhaya v. Indar*, 1947 N 84.

20 *Nathubhai v. Javher*, 1 B 121.

that the authority may be implied.¹ Thus, where a Hindu married woman and her husband jointly and separately entered into a contract to repay the plaintiff the money which he had advanced, she was assumed to have contracted with reference to her *stridhan*, which is analogous to the separate property of a married woman in England, and was liable to the plaintiff so far as her *stridhan* extended.² A disqualified proprietor in Oudh, whose property has been taken charge of by the Court of Wards, is incapable of entering into a contract relating to property outside Oudh and not within the superintendence of the Court of Wards.³ But "it is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himself for the whole".⁴ An Act like the Oudh Land Revenue Act, 17 of 1876, prohibits a disqualified proprietor from creating a charge upon his property but leaves him free to contract.⁵ Under the scheme of the Administration of Evacuee Property Ordinance, 1949, the custodian merely acts as a statutory agent having power to manage and administer the evacuee property and the title of the evacuee remains in suspense till the property is restored to him under sec. 16(1) of the corresponding Act. Therefore he is not incompetent to enter into any agreement to sell.⁶

13. Of Sound Mind.—The contract of a lunatic, like that of a minor, is void,⁷ but that does not affect the surety.⁸

12. What is a sound mind for the purposes of contracting.—A person is said to be of sound mind for the purposes of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

1 *Pusi v. Mahadeo*, 3 A 122.

2 *Govindji v. Lakhmidas*, 4 B 318; *Narotam v. Nanka*, 6 B 473.

3 *Lachmi v. Fateh*, 25 A 195.

4 *Gregson v. Uday*, 17 C 223 PC; *Nihal v. Mir Jan*, 1937 C. 310; *Magan v. Raman*, 1943 B 862.

5 *Dhanipal v. Raja Maneshwar*, 28 A 570 PC; *Jagadis v. Satrugan*, 33 C (1077).

6 *Abdul Satar v. Manilal*, AIR 1970 Guj 12, 18-19.

7 *Machaima v. Usman*, 17 MLJ 78; *Ellammal v. Venkata*, 79 IC 958; see next section.

8 *Ganga v. Hayat*, 52 IC 88.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

1. The section.—This section explains what a sound mind means for the purpose of contracting. It follows that the contract of a person lacking in such an essential element as a sound mind must be void. According to English law the contract will be void if the plaintiff was aware of the fact.⁹ Under that law the contract of a drunken man is voidable and not void, so it is capable of ratification on his becoming sober.¹⁰

2. Of sound mind.—The test of unsoundness of mind is whether a person is incapable of understanding the business concerned and of forming a rational judgment as to its effect upon his interest. There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy this test.¹¹ Mere weakness of mind,¹² or temporary forgetfulness,¹³ is not sufficient. Although it is not necessary to prove utter mental darkness or congenital idiocy,¹⁴ the plaintiff must establish that the person was incapable of understanding business and forming a rational judgment as to its effect.¹⁵ In order to constitute unsoundness of mind, the person executing such a deed must be incapable of understanding and acting in the ordinary affairs of life; it is not necessary that he should be without any glimmering of reason.¹⁶ When a person owing to drink and debauchery “was quite incapable of understanding the contract made by him and of forming a rational judgment as to its effects on his interests,” he was held to be of unsound mind and a claim for refund of the money under S. 65 was disallowed.¹⁷ The fact that the sub-registrar has accepted the document from an executant and has duly registered it is *prima facie* proof that he was not in an intoxicated condition when he presented the document for registration.¹⁸ “To be of sound mind for the purposes of making a contract” a person need not understand all the terms of the contract. It is enough for the executant of a legal document to understand the nature of the transaction, leaving the details to his lawyer.¹⁹ Under S. 11 of the Act, as interpreted by the Privy Council in the case of *Mohori Bibee v. Dhurmodas*,²⁰ a contract by a lunatic is void.¹ The contract of a lunatic so found by inquisition, so long as the inquisition has not been

9 *Imperial Loan Co. v. Stone*, (1892) 1 QB 599; (1891-94) All ER Rep 412.

10 *Matthews v. Baxter*, LR 8 Ex 132; see *Campbell v. Hooper*, 24 LJ Ch 644.

11 *Hall v. Warren*, 9 Ves 605; (1803-13) All ER Rep 57.

12 *Durga v. Muhammad*, 27 A 1 PC.

13 *Sarba v. Manmohan*, 1933 C 488.

14 *Tirumagal v. Ramaswami*, 1 MHCR 224; *Ram v. Laljee*, 8 C 149; *Drew v. Nunn*, 4 QBD 661; (1874-80) All ER Rep 1144.

15 *Mohammad v. Abdul*, 68 IC 372, 377.

16 *Ball v. Mannin*, 3 Bli NSI reld. to in *Tirumagal v. Ramaswami*, 1 MHCR 214.

17 *Kamola v. Kaura*, 15 IC 404.

18 *Kotumal v. Dur Mahomed*, 136 IC 525.

19 *Rajkumar v. Ram*, 82 MLJ 457 PC affirming 55 C 285.

20 30 C 539 PC.

1 *Macphail v. Uman*, 17 MLJ 78.

superseded,² or the management of his property is committed to a committee, even if made during a lucid interval,³ is void, but not the contract of a person not so found.⁴

3. **Insanity.**—The mere existence of a delusion in the mind of a person is not sufficient to avoid a contract, even though the delusion is connected with the subject-matter of such disposition or contract. The real question for determination is whether the delusion affected the disposition or contract.⁵

Undue influence and incapacity are totally different issues. A contract will be held good when the evidence establishes that a person was in a state of mind which showed that he knew what he was doing and that the act which he did was one which he intended to do, and that he was capable of understanding the nature and consequences of the act which he had done.⁶ In order to annul the authority of an agent partial mental derangement of the principal is not enough, his insanity must amount to dementia.⁷ As to nullity of marriage by reason of insanity of one of the parties (see *Durham v. Durham*,⁸ *Yarrow v. Yarrow*).⁹ In the absence of fraud it is not legitimate to commute an insufficient case of insanity into a complete case of weakness when the type of insanity connoted in the evidence is something quite different.¹⁰

4. **At the time of the contract.**—When it is sought to avoid a document on the ground of unsoundness of mind of the executant, it is not enough to establish that he used to drink hard and was not generally in a sober state of mind, but it must be proved by specific evidence to the effect that at the time when the contract was entered into he was of unsound mind in the sense stated in the section.¹¹ Where a person was suffering from a severe form of heart disease and senile dementia and had also rheumatism or paralysis, he was held to be of sound mind at the time of the transaction in question. The question does not depend merely on the belief or disbelief of the witness examined before the Court, but depends largely upon the inference to be drawn from the evidence.¹² That the defendant was before the promise a lunatic is no answer to an action for breach of promise to marry.¹³ Subsequent insanity of a party has, in general, no effect on contracts already entered into by him.¹⁴ Where the defendant at the time of the contract is of unsound mind, the plaintiff is not entitled to a refund of the consideration money paid, under S. 65 or S. 41

2 *Re Walker*, (1905) 1 Ch. 160, 14 LJ Ch. 86, cited in *Subba v. Solaiappa*, 147 IC 479.

3 *Re Marshall*, (1920) 1 Ch. 284.

4 *Hall v. Warren*, 9 Ves. 605, 611: (1803-13) All ER Rep 57.

5 *Jenkins v. Morris*, 14 Ch. D 674, head-note.

6 *Muhammad v. Fateh*, 20 A 4, 10.

7 *Drew v. Nunn*, 4 QBD 661, 669: (1874-80) All ER Rep 1144.

8 10 PD 80.

9 1892 P 92.

10 *Durga v. Mirza*, 31 IA 235, 238.

11 *Jainarain v. Mahabir*, 95 IC 857, 859.

12 *Ram v. Kati*, 164 IC 527; *Tilak v. Mahandu*, 1933 L 458.

13 *Baker v. Cartwright*, 30 LJCP 364.

14 *Re Pagni*, (1892) 1 Ch. 236; see *Burke v. Amalgamated society*, (1906) 2 KB 583.

of the Specific Relief Act, where the suit is neither for rescission nor for cancellation of the contract.¹⁵

5. **Onus.**—Where the executant is not alleged to be generally insane with lucid intervals but rather that he had from time to time attacks of insanity, the onus is on the defendant to show that at the time there was an attack of insanity which made the executant incapable in law of executing the document.¹⁶ Where an insane person had lucid intervals the burden of proving that he was of unsound mind at the time of the execution of a document is heavily on the person challenging the validity of the document.¹⁷

13. "Consent" defined.—Two or more persons are said to consent when they agree upon the same thing in the same sense.

1. **The section.**—This section defines what is meant by consent, the next section states that free consent is necessary in order that a valid contract may arise. The section is apparently based on the following observation in *Smith v. Hughes*.¹⁸ "It is essential to the creation of a contract that both parties should agree to the same thing in the same sense". If the parties are not *ad idem* on the subject-matter about which they are negotiating, there is no real agreement between them.¹⁹ When their minds are directed to different objects, or they attach different meanings to the language which they use, it is obvious that there is no agreement. "The cases in which this may occur are the following: (1) when the misunderstanding relates to the identity of the other party to the agreement; (2) when it relates to the nature or terms of the transaction; and (3) when it relates to the subject-matter of the agreement".²⁰ A party may be taken to have assented if he has so conducted himself as to be estopped from denying that he has so assented.¹

2. **Mistake as to the identity of the person.**—When one makes a contract in which the personality, so to speak, of the particular party contracted with is important for any reason, whether because it is to write a book, or paint a picture, or do any work of personal skill, or whether because there is a set-off due from that party, no one else is at liberty to step in and maintain that he is the party contracted with, that he has written the book, or painted the picture, or supplied the goods, and that he is entitled to sue.^{1a} Where a deceitful person by imitating the signature of a respectable firm obtained delivery of certain goods from the vendor and sold a part to another, the sale was of no effect because the purchase by the deceitful person was void in law. The Court

15 *Doulatuddin v. Dhaniram*, 32 IC 804.

16 *Lakshminath v. Benares Bank*, 115 IC 201; *Mohan v. Vinayak*, 1941 N 251.

17 *Tilok v. Mahandu*, 144 IC 741; See *U. Aung v. Ma E*, 1932 R 24; *Hazrabai v. Matmabai*, 1938 N 204.

18 LR 6 QB 597, 609.

19 *Singhasan v. Jadu*, 117 IC 315.

20 C & S 57.

1 *Halsbury's Laws of England*, 4th ed., Vol 9. Para 238.

1a. *Boulton v. Jones*, 27 LJ Ex 117.

thus observed: "Of him (the deceitful person) they (the vendors) knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever".² Whether an error in regard to the person with whom a contract is entered into destroys the consent and annuls the agreement has been answered thus: "This question would be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, an error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand".³ A person who applies for shares in a false or fictitious name and intends to keep them is liable as a shareholder,⁴ but not where that intention is absent.⁵

Where a party present and in his own person represents himself to be someone else and thereby induces the other party to enter into a contract with him, the question arises whether the contract is good; the answer has been given in these words: "Jurists have laid down the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void".⁶ In *Lewis v. Avery*,⁷ L sold his car to R under a mistaken belief caused by R that R was another person of standing on receipt of a cheque which proved to be worthless. The sale was held to be voidable and not void and L's suit for the recovery of the car from A, a *bona fide* purchaser for value was dismissed. Where the plaintiff intended to deal with a firm and a person falsely representing himself to be a partner obtained delivery of goods from the plaintiff, *held*, there was no contract with the individual or the firm.⁸ Where the personality of the contracting party is immaterial, or where a party after becoming aware of the mistake treats a contract as subsisting, then the contract is binding.⁹ As to the effect of mistake on a contract of marriage, see the discussion of the law in *Moss v. Moss*.¹⁰

2 *Cundy v. Lindsay*, (1878) 3 AC 459, 465-6, fold in *Baillie's Case*, (1898) 1 Ch. 110; see *Meynell v. Surtees*, 3 Sm & G (117).

3 *Gordon v. Street*, (1899) 2 QB 641, 647: 69 LJ QB 45.

4 *Re Hercules Insurance Co.* LR 13 Eq 566.

5 *Re Britannia Fire Association*, (1891) 1 Ch. 202.

6 *Lake v. Cimmons*, (1927) All ER Rep 49: 1927 AC 487, 501, *Smith v. Wheatcroft*, 9 Ch. D 223, (1874-80) All ER Rep 693 *referred to*; *Phillips v. Brooks*, (1919) 2 KB 243: (1918-19) All ER Rep 246 is an illustration of the other class of cases where the contract was held good.

7 (1971) 3 All ER 907.

8 *Hardman v. Booth*, 32 LJ Ex 105: (1863) 1 H&C 803.

9 *Mahomed v. Chatterput*, 20 C 854.

10 1897 P 263.

Three plaintiffs, joint owners of a car, advertised it for sale. A., introducing himself as H., offered to buy it. When he pulled out his cheque book to pay for it, the first plaintiff, conducting the negotiations for the plaintiffs, told him that they expected cash, that they were not prepared to accept payment by cheque, and that the proposed sale was cancelled. A. thereupon said that he was P.G.M.H., a reputable businessman, living at an address in Caterham, and having business interests in Guildford. The plaintiffs had never heard of P.G.M.H., but the second plaintiff forthwith went to the local post office and ascertained from the telephone directory that there was such a person as P.G.M.H., living at the address given by the rogue. The second plaintiff told the first plaintiff what she had learnt and, as the result of that information, they believed that A. was P.G.M.H. and decided to let A. have the car in exchange for his cheque.

A. had nothing whatever to do with the real P.G.M.H., and A.'s cheque was dishonoured on presentation. Meanwhile, A. had sold the car to the defendant, who bought it in good faith.

On a claim by the plaintiffs against the defendant for the return of the car, or alternatively, damages for its conversion, it was held (Devlin L.J. dissenting) that where a person was physically present and negotiating to buy a chattel fraudulently assumed the identity of an existing third person, the test to determine to whom the offer was addressed was how the promisee ought to have interpreted the promise; applying that test to the present case and treating the plaintiffs as the offerers, the offer was made solely to the real P.G.M.H. A. was incapable of accepting it, and the plaintiffs' mistake, therefore, prevented the formation of a contract with A. Accordingly, the plaintiffs' claim succeeded.¹¹

3. Mistake as regards the nature of the transaction.—A man is ordinarily bound by his written contract. But the question has arisen whether a man can set aside a contract which he has executed on the ground that he was ignorant of its character or contents. The law has been thus laid down.¹² "If a blind man, or a man who cannot read, or who has for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or the illiterate man afterwards signs; then, at least, if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and, therefore, in contemplation of law, never did sign the contract to which his name is appended". The rule does not apply

11 *Ingram v. Little*, (1960) 3 WLR 504 CA. In this decision the dictum of Viscount Haldane in *Lake v. Simmonds*, (1927) AC 487, 500, HL was appointed; the case of *Phillips v. Brooks*, (1919) 2 KB 243, was distinguished; and the cases of *Hardman v. Booth*, (1868) 1 HLC 803, and *Cundy v. Lindsay*, 47 LJ QB 481; (1878) 3 AC 459, HL, were considered; See Halsbury, 4th ed., Vol 9, Paras 291, 293.

12 *Fester v. Mc. Kinnon*, LR 4 CP 704, 711; 38 LJ CP 310; see *Dagdu v. Bhana*, 28 B 420; *Chimanram v. Divanohund*, 56 B 180, 189-90.

to the case of negotiable instruments in order to protect innocent transferees for value.¹³

The rule is settled that when a person, whether literate or illiterate, is induced to sign a document which is essentially different from a document which he intended to execute or thought he was executing when he affixed his signature, the document is a nullity, though a person may be estopped from disputing it if there be negligence on his part.¹⁴ Where a written contract has been signed by the parties, the party who alleges that it has been erroneously recorded and that he has signed it under a mistake must establish the facts beyond all doubt. Where, however, parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently if he seeks to take advantage of that error, so he cannot be allowed to enforce it.¹⁵ Where a broker signs bought and sold notes materially different from each other there is no contract.¹⁶ There is a presumption of law that when a man signs a deed he is acquainted with its contents.¹⁷ A document is a nullity where the executant signed it on the first page but not on other pages, as he discovered that the document was not in accordance with the terms which had previously been agreed upon. Such a document has no effect on title to property and does not require to be set aside or cancelled.¹⁸ But it is not necessary for a vendor to understand all the terms of an agreement for sale prepared and approved by his lawyer. "It is enough for the executant of a legal document to understand the nature of the transaction, leaving the details to his lawyers". "Disputes about the dispositions and contracts of people of advanced age and failing powers are always difficult cases to decide".¹⁹ So where a man executed a deed and signed on the back of a receipt for money relying solely on the representations of his solicitor, he was held bound by his acts.²⁰

Where a person chooses to entrust his agent with a blank paper duly stamped as a bond, signed and sealed by himself, in order that the instrument may be duly drawn up and money raised upon it for his own benefit, if the instrument is afterwards drawn up and money obtained upon it from persons who have no reason to doubt the *bona fides* of the transaction, in the absence of any evidence to the contrary that the bond was not drawn in accordance with the obligor's wishes and instructions, he will be bound by the bond as actually drawn up. The rule is the same in the case of a bill of exchange or promissory note, in which case an endorsement made before the instrument is drawn renders

13 See *Carlisle & Cumberland Banking Co. v. Bragg*, (1911) 1 KB 489, 494: 80 LJ KB 472.

14 *Oriental Banking Corpn. v. Fleming*, 3 B 242, 266, 267; *Hem v. Bhagwat*, 80 IC 67; *Bagot v. Chapman*, (1907) 2 Ch. 222: 76 LJ Ch. 523; *Chaplin v. Brammall*, (1908) 1 KB 233: 77 LJ KB 366.

15 *Binns v. Avery*, 38 CWN 908; *Garrard v. Frankel*, 30 Beav 445: 31 LJ Ch. 604.

16 *Grant v. Fletcher*, 5 B & C 436.

17 *Re Cooper*, 20 Ch. D 611, 629.

18 *Banku v. Kristo*, 30 C 483.

19 *Raj Kumar v. Ram*, 34 Bom. LR 526 PC.

20 *Hunter v. Walter*, LR 7 Ch. 75: 41 LJ Ch. 175.

the endorser liable for any amount warranted by the stamp which may afterwards be filled up on the face of the bill.¹

Where a steamer was chartered to sail from "Jedda 15 days after the Haj" and the defendant inserted the date "the 10th August 1892", which was accepted by the plaintiff in the belief that it corresponded with the 15th day after the Haj, there was no contract.² Similarly where in a contract a party inserted a term in Chinese character if the other party, not understanding Chinese, assented to the term, he was not bound by it.³

As to the case of *purdanashin* ladies, see S. 16, note.

There is another class of cases where some of the terms of a proposal appear on the face of it and others do not, and the question arises how far an acceptor is bound by the terms of which he is not aware; the result of the decisions is that if the acceptor is not aware of the existence of the conditions or his attention is not sufficiently drawn to them he will not be bound by them.⁴

4. Mistake as to the subject-matter of the contract.—The law with regard to the defects in the subject-matter of a contract has been thus stated: If the vendor, at the time of the contract, does not know of the existing defect in the estate, the court will enforce the contract, otherwise, perhaps, if the defect be known to the vendor, and is one which a provident purchaser could not discover. The law is the same where the value is affected by a nuisance in the neighbourhood.⁵ Where a broker, employed both by seller and buyer, negotiates a sale, but by mistake delivers to the parties sale notes differently describing the goods, no contract can arise.⁶ Where the defendant ordered the plaintiff by wire to send three rifles, by mistake the telegraph clerk telegraphed the word 'the', and 350 rifles were sent there was no contract between the parties.⁷ An ambiguity in a message sent by a telegraphic code is fatal to the formation of a contract.⁸ In *Smidt v. Tiden*⁹ a charter-party agreement did not create a contract because each of the parties acted under a mistake. The plaintiff, the master of the vessel, supposed that a bill of lading which he signed referred to his charter-party with the broker, while the defendant supposed that it referred to another document. In *Raffles v. Winchellhaus*¹⁰ there was no contract because the minds of the parties were not at one as there were two boats of the same name. But a mistake as to the name of a vessel in a contract of insurance was held not to defeat the contract where the policy designated the subject with

1 *Wahidunnessa v. Surjadass*, 5 C 39; but see *Ruben v. Great Fingal Consolidated*, (1904) 2 KB 712; (1904-07) All ER Rep 460; *Whitechurch v. Cavanagh*, 1902 AC 117.

2 *Haji Abdul v. Bombay & Persia S. N. Co.*, 16 B 561.

3 *Ah Shain v. Moothia*, 27 C 403.

4 *Richardson v. Rowntree*, 1894 AC 217; 63 LJ QB 283 fold in *Marriott v. Yeoward*, (1909) 2 KB 987; LJ KB 114; see S. 4.

5 *Lucas v. James*, 7 Hare 410, 418; see Halbury, 4th ed., Vol. 9 Para 294.

6 *Thornton v. Kempster*, 5 Taunt 786; 128 ER 901.

7 *Henkel v. Pape*, LR 6 Ex. 7: 40 LJ Ex. 15.

8 *Falck v. Williams*, 1900 AC 177; 69 LJ PC 17.

9 LR 9 QB 446.

10 2 H & C 906.

sufficient certainty or suggested the means of doing it.¹¹ Where a bill is asked to be given on one firm, but is actually drawn on another there is no consent; but a party may be disentitled from recovering owing to his negligence if he keeps the bill and the position of the parties is altered.¹² Where the parties are not *ad idem* as to the subject-matter of a proposed sale, there can be no contract of bargain and sale.¹³ Where the parties purport to enter into a contract on bought and sold notes according to the form prescribed by the by-laws of Jute and Hessian Exchange, the contract cannot be regarded as a concluded contract if there are discrepancies between the bought and sold notes.¹⁴

14. "Free consent" defined.—Consent is said to be free when it is not caused by—

- (1) coercion, as defined in Section 15, or
- (2) undue influence, as defined in Section 16, or
- (3) fraud, as defined in Section 17, or
- (4) misrepresentation, as defined in Section 18, or
- (5) mistake, subject to the provisions of Sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

The section.—The section does not state the effect on a contract of a consent which is not free. For that purpose reference has to be made to Ss. 19-21 which deal with the effects of the various elements mentioned in this section, elements which vitiate consent by preventing it from being free.

15. "Coercion" defined.—"Coercion" is the committing or threatening to commit any act forbidden by the Indian Penal Code (XLV of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code (XLV of 1860) is or is not in force in the place where the coercion is employed.

Illustration

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (XLV of 1860).

¹¹ *Ionides v. Pacific Insee. Co.*, LR 6 QB 674, 686.

¹² *Nightingale v. Faizulla*, 4 A 334.

¹³ *Scriven Bros. v. Hindley*, (1913) 3 KB 564.

¹⁴ *Fort Golster Industries v. Sethia Mercantile*, AIR 1963 SC 1808.

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code (XLV of 1860) was not in force at the time when or place where the act was done.

1. Coercion under English and Indian law.—The section has to be read along with Ss. 13 and 14 in order to understand it. The first principle of contract is that there should be voluntary consent to it. Duress in English law is limited to the duress of the person. It must consist of threat of personal violence, *i.e.*, concern the safety of the person of a man, and not his house or goods. If a debt really exists the right to sue for it must be upheld, even though there may have been a threat by the creditor of criminal proceedings.¹⁵

Duress may be physical or moral. The fear caused must be real. A threat to prosecute may not amount to coercion.¹⁶ Thus, a bond given by a person illegally arrested to avoid imprisonment where the obligee has no authority to release is void.¹⁷ The Indian law is wider. Apparently when the legislature was considering the matter for the purpose of applying the law to India, they thought it right to extend it beyond the law of England to unlawfully detaining or threatening to detain any property.¹⁸ In order that there may be coercion by detention of goods, the detention must be unlawful, and it must be shown that it was effected with the intention of causing the other party to enter into the agreement.¹⁹ Where by the seizure of a part of the estate of a deceased person, a claimant induced the widow of the deceased to execute a bond in his favour, the detention being unlawful, the bond could not be sued upon.²⁰ Where there was obstruction to the removal of the corpse of her husband until a certain adoption was made by the widow, the adoption could not be valid.¹

2. Any act....Penal Code.—The test thus provided cannot but be regarded as arbitrary and not as intended to promote any general policy. Thus, the Madras High Court was divided in its opinion whether a threat to commit suicide amounted to coercion and rendered a deed executed under such threat voidable. The majority held that the deed was voidable.² Acts of an agent of a party under duress are voidable like those of the principal. Thus, where A was confined in a lunatic asylum, while proceedings in lunacy were pending against her at the instance of her daughter, counsel for both sides entered into an agreement that she should be released in consideration of her giving up certain title deeds, the agreement was held to be void.³ An agreement entered into under duress cannot be set aside by the party coerced if he has voluntarily acted upon the agreement with knowledge of all the facts.⁴ An agreement to refer

¹⁵ *Flower v. Sadler*, 10 QBD 572.

¹⁶ *L. & L. Insee. Co. v. Binoy*, 1945 C 218.

¹⁷ *Paxton v. Popham*, 9 East 416 f.n.

¹⁸ *Bengal Stone Co. v. Hyam*, 27 CLJ 78.

¹⁹ *Stoomal v. Haridas*, 7 IC 595.

²⁰ *Hla Maung v. Toke*, 55 IC 741.

¹ *Ranganayakamma v. Alwar*, 13 M 214.

² *Ammiraju v. Seshamma*, 41 M 33; *Chikkam v. Chikkam*, 32 MLJ 494.

³ *Cumming v. Ince*, 11 Ad. & El. QBNS 112.

⁴ *Ormes v. Beadel*, 30 LJ Ch. 1; 17 LJ QB 105; 116 ER 418.

matters in dispute to arbitration during the pendency of criminal proceedings and in fear of their continuance is not void on the ground of coercion, though it may be challenged as being in part for an unlawful consideration.⁵

3. Any person whatever.—These words have been used advisedly to indicate that the act need not be to the prejudice of the person entering into the contract. The words “to the prejudice of any person whatever” relate both to the committing or threatening to commit an act forbidden by the Penal Code and to the lawful detaining or threatening to detain property. Suicide and an attempt to commit suicide are acts forbidden by the Penal Code though the former cannot be punished. The threat need not proceed from the party to the agreement.⁶ The line between coercion (S. 15) and undue influence (S. 16) is sometimes thin and it is possible to conceive of cases where the acts might fall under both heads.⁷

4. Coercion, illustrations of.—Where an agent refused to hand over the account books, etc., of the business at the end of his term of office to a new agent sent in his place, unless the principal gave him a release from all liabilities, and such a release had to be given before the new agent could get the books, etc., but the old agent still withheld some property, the deed of release was voidable at the instance of the principal, but in this case there was a valid ratification of the release by reason of the statement made by the principal's counsel in court.⁸ Where a contract was made in France under coercion, but was not affected by the French law, the English Court, where the action was brought, declined to enforce it, as it was in contravention of an essential principle of justice or morality.⁹ To obtain money under a threat of any kind, or to attempt to do it, is no doubt an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent mind.¹⁰ Where a servant girl against her will and in spite of her protest had to submit herself to be examined by a doctor at the dictate of her mistress, *held*, there was no evidence of coercion.¹¹ Where under the pretence of going to an afternoon service A told B outside the church, “you must come into the church and marry me or I will blow my brains out,” and B accordingly out of fear went into the church where the ceremony of marriage was performed, the marriage was binding as there was no threat of violence to the lady, “the principles which regulate the validity of solemn contracts must not be strained to meet hard cases, least of all when the contract in question is one of marriage”.¹² A judgment-debtor, who was arrested in execution of a decree made against him by a court which had no jurisdiction to make it, gave the decree-holder a bond for the amount of the decree in order that he might be

5 *Gobardhan v. Jaikrishen*, 22 A 224; see *Williams v. Bayley*, LR 1 HL 200: (1861-73) All ER Rep 227.

6 See *Askari v. Jaikisore*, 16 IC 344.

7 *Ammiraju v. Sesamma*, 41 M 33: 40 C 598 PC.

8 *Muthia v. Karuppan*, 50 M 786.

9 *Kaufman v. Gerson*, (1904) 1 KB 591: (1904-07) All ER Rep 896.

10 *R. v. Southerton*, 6 East 125: (1803-13) All ER Rep 732.

11 *Latter v. Braddel*, 50 LJ CP 166 on app. 448.

12 *Cooper v. Crane*, 1891 P. 369: 61 LJ P. 35.

released from such arrest, *held* that the bond was void because given under duress.¹³ But the trend of modern decisions in England is different. Thus where a suit was pending against A for the recovery of a sum, and subsequently A was arrested, while in the custody of the sheriff under a writ duly issued in that action, he promised to pay the plaintiff a sum for the debt with interest and costs in consideration of his discharge out of the custody, the promise was held to be binding. "For ought that appears," the Court observed, "that arrest was legal and the party was in lawful custody; this is not therefore a case under duress".¹⁴ Where a creditor obtained a warrant for the arrest of a debtor but told the sheriff's officer that if he got a certain instrument he was not to proceed any further with the writ, and the officer, by holding out a threat of arrest, got the instrument and delivered it to the creditor, *held*, the document was obtained under duress because there was a gross and scandalous abuse of the process of the court in procuring it.¹⁵ When a person who has refused to convey the equity of redemption except on certain terms has unlawfully detained or threatened to detain any property he is not guilty of coercion.¹⁶ Money paid to a trade association in order that it may not put on a stop list the name of a person who has infringed its rule is not paid under duress and so is irrecoverable.¹⁷ Money paid under protest is paid under undue pressure and can be recovered.¹⁸

5. **Onus.**—The burden lies on the plaintiff to prove pressure or undue influence and when neither of these has been substantiated, an action cannot be maintained to have the transaction set aside. Where, however, the parties stand in a fiduciary relation to each other, the onus is cast upon the defendant to support the contract.¹⁹ Where threats of bodily harm are made by one party against the other, no burden lies on the party threatened to show that but for threats no agreement would have been made by him; agreement is voidable unless the party who made threats can show that threats contributed nothing to the other party's decision to enter agreement.²⁰

16. **"Undue influence" defined.**—(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the

13 *Bonda v. Banspat*, 4 A 352.

14 *Smith v. Monteith*, 13 M & W 427; 14 LJ Ex 22; 153 ER 178; 2 Dow & L 358.

15 *Grainger v. Hill*, 7 LJCP 85.

16 *Bengal Stone Co. v. Hyam*, 27 CLJ 78.

17 *Hardie v. Chilton*, (1928) 2 KB 306; (1928) All ER Rep 36.

18 *Fraser v. Pendlebury*, 31 LJCP 4.

19 *McClatchie v. Haslam*, 65 LT 691.

20 *Barton v. Armistrong*, (1975) 2 All ER 465 PC.

other, or where he stands in a fiduciary relation to the other; or

- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section III of the Indian Evidence Act, 1872 (I of 1872).

Illustrations

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the moneylender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

1. Amendment.—The present section has been substituted by the Amending Act VI of 1899 S. 2. The original section was as follows:—

'Undue influence' is said to be employed in the following cases:—

(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained;

(2) When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.

2. The section.—A person standing in a near relationship, in which authority or influence may be supposed to exist, cannot hold a gift without making it clear that the intention to make it was not the result of his influence. The relationship does not of itself preclude the making of the gift, but the burden lies on the donee to show that there was no such influence as to the source of the gift. The donee can discharge the burden incumbent on him

by showing that, the relationship notwithstanding, the donor knew completely what he was doing and acted of his own complete free will. The courts have refused to enumerate exhaustively the cases in which the presumption of undue influence will *prima facie* be made,¹ or even to define it.² The opinion has been expressed that the section, as it now stands, requires that the undue influence should proceed from a party to the suit and that the language of the section is in this respect narrower than that of the section for which it was substituted; but the undue influence which may affect a purdanashin lady's understanding of a document may proceed from a third party.³ Questions as to undue influence, unconscionable bargains, and dealing with expectant heirs must be decided on the provisions of this section and on them alone. The principle upon which the English Courts of equity deal with similar questions are entirely inapplicable.⁴ The equitable jurisdiction based on undue influence is only a development of the principle of relief on the ground of fraud.⁵ The section deals in terms with the exercise of undue influence by third parties in conspiracy with or through the agency of others.⁶ Lastly, the general principle must not be lost sight of that the period at which the court is to examine the contract between the parties is the time when they contracted. Where the transaction, when originally entered into, was fair and reasonable, and there was no undue advantage taken, nothing suppressed, nothing mistaken, the court cannot grant any relief to either party.⁷

The section does not come into operation unless an unfair advantage has been obtained in inducing a contract. But it does not cover every case where an unfair advantage has been obtained. It is restricted to cases where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and that position has been used to obtain an unfair advantage. This is the effect of sub-s. (1). Sub-s. (2) states who is to be deemed to be a person in a position to dominate the will of another. Sub-s. (3) deals with the burden of proof. It only comes into operation when (i) the transaction on the face of it or on the evidence adduced appears to be unconscionable, and (ii) the contract has been entered into by a person who is in a position to dominate the will of another. The section cannot be brought into operation (1) unless there is a person who is in a position to dominate the will of the other, and (2) unless he has obtained an unfair advantage or has entered into a transaction that appears on the face of it or on the evidence adduced to be unconscionable.⁸ To establish a case of

1 *Duing v. Chabak*, 103 IC 239 PC.

2 *Alloard v. Skinner*, 36 Ch. D 145.

3 *Badiatannessa v. Ambica*, 18 CWN 1133.

4 *Lala Balla v. Ahad*, 23 CWN 233 PC; *Batul v. Debi*, 89 IC 348.

5 See *Chesterfield v. Jansen*, 2 Ves. Sen. 125: 26 ER 191 LC; *Lancashire Loans Ltd. v. Banks*, (1934) 1 KB 380, 403, 404: (1933) All ER Rep 201.

6 *Rama v. Lingappa*, 58 M 454.

7 *Revel v. Hussey*, 2 B & B 280, 288.

8 *Lingo v. Dattatraya*, 39 Bom. LR 1233; *Latif v. Nabi*, 1932 A 174; *Ram v. Bansidhar*, 1947 O 82; *Anup v. Bhagwat*, 1930 N 535; *Mohan v. Kashi*, 1950 N 71.

undue influence, it is not sufficient to raise an atmosphere of suspicion, but there must be clear and definite evidence of the case propounded.⁹ A person is said to dominate the will of another when he holds a real or apparent authority over the other, specially in the case in which the other person is one whose mental capacity is affected by reason of age, illness, bodily or mental distress.¹⁰

3. **Undue influence.**—The doctrine of undue influence was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence, spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian Contract Act is founded substantially on the rules of English law.

A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other. It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction; he has to prove (a) that the other party to a transaction was in a position to dominate his will and (b) that the other party had obtained an unfair advantage by using that position.

Sub-section (2) lays down a special presumption that a person is deemed to be in a position to dominate the will of another (i) where he holds a real or apparent authority over the other, or (ii) where he stands in a fiduciary relation to the other or (iii) where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Where it is proved that a person is in a position to dominate the will of another (such proof being furnished either by evidence or by the presumption arising under sub-section (2)) and he enters into a transaction with that other person which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But sub-section (3) has manifestly a limited application; the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was in a position to dominate the will of the other and that the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and the burden will not shift.¹¹

Courts of equity have never set aside gifts on the ground of the folly, improvidence or want of foresight on the part of donors. The courts have always repudiated such jurisdiction. On the other hand, to protect people from being forced, tricked, or misled, in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable

⁹ *Chandravati v. Janti*, 1935 L 333.

¹⁰ *Abdur v. Aymona*, 1937 C 492.

¹¹ *Ladli Parshad v. Karnal Distillery Co.*, ALR 1963 SC 1279, 1290.

doctrine of undue influence has grown out of and been developed by the necessity of grappling with the insidious forms of spiritual tyranny and with the infinite varieties of fraud.¹² Principles followed by Courts of Equity in case of agreements induced by undue influence, fraud, etc., are equally applicable to India.¹³ In this case it has been laid down that a gift, to be set aside on the ground of undue influence, must fall within one or other of these two groups:—

(1) Cases in which there have been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. In such cases the court must be satisfied that the gift was the result of influence expressly used by the donee for the purpose, and the Court sets aside the gift acting on the principle that no one shall be allowed to retain any benefit arising from his own fraud.

(2) The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice and was removed from the influence when the gift to him was made.

The question therefore is not whether the donor knew what he was doing but how the intention was produced; though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside.¹⁴ The protection of the court is not confined to cases of a strictly fiduciary character, e.g., to guardian and ward, to solicitor and client, or trustee and *cestui que trust*. The principle applies to every case where influence is acquired or abused, where confidence is reposed and betrayed.¹⁵ In cases of merely trifling gifts the court would not interfere, but with regard to all other gifts it may be laid down as a general rule that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had competent and independent advice in conferring them.¹⁶ The rule is intended to secure the execution of the duty, which a person holding a fiduciary position takes upon himself to perform and, therefore, has no application in the case of a dealing unconnected with the

¹² *Allcard v. Skinner*, 36 Ch. D 145: (1886-90) All ER Rep 90.

¹³ *Rama v. Mayikham*, 1935 M 726.

¹⁴ *Hoghton v. Hoghton*, 15 Beav. 278; 21 LJ CH 482; 51 ER 545 cited in *Allcard v. Skinner*, 36 Ch. D 160: (1886-90) All ER Rep 90.

¹⁵ *Smith v. Kay*, 7 HLC 750, 779; 11 ER 299 HL; 30 LJ Ch. 45.

¹⁶ *Rhodes v. Bate*, LR 1 Ch. 252: (1861-73) All ER Rep 805 fold in *Liles v. Terry*, (1895) 2 QB 679: (1895-99) All ER Rep 1018.

duty, *e.g.*, the rule has never been applied to a purchase by a mortgagee from the mortgagor.¹⁷

Courts have never attempted to set aside contracts simply because they have been ill-considered or foolish, but what the courts do is to see that where one person is so situated as to be under the control and influence of another, such other does not unfairly exercise the influence and control for the advantage of himself, or of some object in which he is interested, unless he can give clear and cogent proof that the transaction complained of was such as the law would support and recognise. The courts have always placed the burden of sustaining the transaction upon the party benefited by it.¹⁸ A covenant in a mortgage deed fixing 58 years for redemption is not, in the absence of fraud or duress, void on the ground of being hard and unconscionable.¹⁹ Not only should there be evidence of general undue influence but there should be specific evidence that the transaction in question was brought about by undue influence.²⁰ Where a liability is acknowledged or renewed very often it cannot be said to be tainted with undue influence.¹ Where a loan was granted only after an acknowledgement was made by the borrower of his indebtedness on a *hatchita* executed in the previous year, this did not establish that consent was caused by undue influence.² The mere fact that a party to an agreement has a very strong motive for executing a document does not raise a presumption that he has been unduly influenced.³ The test to determine whether a compromise is vitiated by undue influence is not that the defendant had no other option but to accept it.⁴ A promise extracted by a threat to prosecute is vitiated by undue influence.⁵ A finding that a document has been executed owing to undue influence is not a pure finding of fact but is rather a legal inference from the facts of the case.⁶

4. **Inadequacy of consideration.**—The amendment of the section has not effected any change in the law. "Inadequacy of consideration in conjunction with the circumstances of indebtedness and ignorance were facts from which it would have been permissible before the amendment of the Contract Act to infer the use of undue influence as it would be since that amendment".⁷ But the fact that a person is obliged to part with his property for what he considers

17 *Knight v. Marjoribanks*, 2 Mac. & G 10.

18 *Lyon v. Home*, LR 6 Eq. 655; 37 LJ Ch. 674, cited in *Sital v. Parbhu*, 10 A 535; *Venkatarama v. Krishnammal*, 52 MLJ 20.

19 *Ram v. Jagrup*, 10 ALJ 157; *Dalthamman v. Amardeo*, 12 ALJ 492 (30 years); see note 13.

20 *Rajraeshwara v. Kuppuswami*, 41 MLJ 474.

1 *Dialaram v. Sargha*, 114 IC 693.

2 *Bijoy v. Kumudi*, 29 CLJ 488.

3 *Sadiqa v. Ataullah*, 1933 L 885.

4 *Raja Shiba v. Tincouri*, 1939 P. 477.

5 *L. & L. Insee. v. Binoy*, 1945 C 218.

6 *Ganga v. Jang*, 167 IC 424.

7 *Kedari v. Atmarambhat*, 8 BHC RACJ 11 cited in *Bhimbhat v. Yeshwantrao*, 25 B 428; see *Permanent Trustee Co. v. Bridge-water*, 166 IC 834. For inadequacy of consideration see S. 25 note.

an unduly low price on account of his pressing necessities is not a ground for holding that the contract is vitiated by undue influence.⁸ But in an English case it has been laid down that if a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction.⁹ The circumstance of poverty and ignorance of the vendor and absence of independent advice throw upon the purchaser, when the transaction is impeached, the onus of proving that the purchase was "fair, just and reasonable".¹⁰ Mere inadequacy of price is no ground of relief in equity or at law where the parties are on equal terms. But if the court of equity finds that the parties did not meet on equal terms, that the vendor was in distressed circumstances and that advantage was taken of that distress, it will avoid the contract.¹¹ Inadequacy does not defeat title, but may go to show the deed to be the result of undue influence.¹² A poor man in need of money was made to buy property at ten times its value in return for a loan to enable him to conduct litigation, *held*, the transaction could not stand. But inadequacy of value in itself is not a sufficient ground for avoiding a sale.¹³

5. Undue influence and coercion.—"To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It is only when the will of the person... is coerced into doing that which he or she does not desire to do, that it is undue influence".¹⁴ "It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or other of those heads—coercion or fraud".¹⁵ Coercion as thus used should not be understood in the sense in which the term is used in S. 15. Coercion as used in English cases with regard to undue influence must be understood as meaning that the person coerced is not able to exercise his free volition owing to the domination of the will of some other person. It is not necessary that the coercion should be by threat of or by committing any act forbidden by the Penal Code or by unlawful detention etc. If a person has such influence over another and by that influence reduces the will of the other to his subjection, whatever may be the nature of the influence, spiritual, moral, social, or any other influence, then it is such coercion as is sufficient to constitute undue influence.¹⁶ The fact is that undue influence and coercion were not clearly distinguished in old English law, though there is a well defined distinction now. Whether an instrument is obtained from a person by undue influence and misrepresentation is a question of fact.¹⁷ Pressure by relatives who

8 *Sundarambal v. Yogavana*, 38 M 850.

9 *Whittet v. Bush*, 40 Ch. D 312: (1886-90) All ER Rep 1084.

10 *Fry v. Lane*, 40 Ch. D 312; *Koze v. Makhan Singh*, AIR 1973 MP 252.

11 *Wood v. Abrey*, 3 Madd, 417: 56 ER 558.

12 *Rashbehari v. Haripada*, 59 CLJ 387.

13 *Cockell v. Taylor*, 15 Beav. 108, 115.

14 Cited with approval in *Miller v. Grand Trunk Ry.*, 1906 AC 187, *referred to in Bara Estate v. Anup*, 41 IC 337.

15 *Someshwar v. Tribhawan*, 32 ALJ 585 PC citing *Boyse v. Rossborough*, 6 HLC 45: (1843-60) All ER Rep 610.

16 *Venkatarama v. Krishnammal*, 52 MLJ 20.

17 *Gopal v. Jagannath*, 59 B 502.

threatened the plaintiff with ruin and counsel of friends who advised that there was danger of something terrible happening if he persisted in his refusal cannot be called undue influence. It was much more like coercion. A person may be forced by circumstances to enter into a transaction. If it is pointed out that he ought to enter into it, etc., that would be pressure no doubt but not undue influence or coercion.¹⁸

6. **Relations.**—The word 'relations' means not only personal relations, but the circumstances in which the contract was entered into. Thus, where there was contract between a moneylender and a poor widow, entered into for the purpose of enabling her to establish a right to maintenance, the contract was held to have been induced by undue influence.¹⁹ The jurisdiction is exercised by courts of equity over the dealings of persons standing in certain fiduciary relations but the court does not define what constitutes such a relation.²⁰

7. **Sub-section (1).**—According to the section the first necessary element in a case of undue influence is to see whether the person who is said to have exercised it was or was not in a position to dominate the will of the other person. Once it is established that he was, sub-sec. (3) will apply if the transaction appears to be unconscionable.¹ As has been observed by the Privy Council, in order to establish a case of undue influence it is not necessary to show that the plaintiff has obtained an unfair advantage over the defendants, but it must be proved that the plaintiff was in a position to dominate the will of the defendants.² The first thing to be considered is the relationship between the parties, i.e., whether one was in a position to dominate over the other, then it must be proved that the position was used to obtain an unfair advantage; relief cannot be granted, even though the transaction be unconscionable, if the initial fact of the position to dominate the will be not established.³ There are well known relations which plainly fall within this sub-section. Where no such specific relations exist and the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence; and in such cases the nature of the benefit, or the age, capacity, or health, of the party on whom the undue influence is alleged to have been exerted, is of great importance. The test is whether confidence reposed by one party has been betrayed by the other, which means that there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves.⁴ It is not enough to show that the lender was in a position to dominate the will of the borrower, but it must also be shown that he used it to obtain from the borrower an unfair advantage,

18 *Lingo v. Dattatraya*, 39 Bom. LR 1233.

19 *Annapurni v. Swaminathan* 6 IC 439.

20 *Tata v. Williamson*, LR 2 Ch. 55: 15 LT 549.

1 *Parbhu v. Puttu*, 1 Luck 144; *Kali v. Protap*, 17 CLJ 221.

2 *Sundar v. Sham*, 34 IA 9, refd. to in *Homeshwar v. Kameshwar*, 39 CWN 1180 PC.

3 *Lingo v. Dattatraya*, 39 Bom. LR 1223.

4 *Ganesh v. Vishnu*, 32 B 37; *Boyse v. Rossborough*, 6 HLC 2, 45: (1843-60) All ER Rep 610; *Ganga v. Jang*, 167 IC 424.

e.g., more onerous terms than were reasonable, it is then that the transaction will be set aside.⁵

8. Sub-section (2)(a).—"Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them".⁶ Where two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted, to obtain advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation existed. Pending the continuance of the confidential relation between the parties, the defendant failing to communicate all the information he acquired regarding the property of the plaintiff purchased by him, the transaction was set aside.⁷ It is not necessary in order to establish the presumption of undue influence that the parties should stand in some relationship to each other, though the presumption can be more easily established in such a case.⁸ The mere fact that the landlord has got a decree for ejectment against the tenant is no ground for holding that a deed of lease between them is vitiated by the exercise of undue influence.⁹ Where the donees stood in a fiduciary relation with the donor and took advantage of that position by inducing through fear the belief that a band of Akalis had come to get him arrested under a warrant and to take possession of his property, all of which were untrue to their knowledge, the agreement entered into between the parties under such circumstances was the result of undue influence and fraud.¹⁰ It is not every fiduciary relationship which can be deemed sufficient to lead to the inference that the person standing in such relation to another is in a position to dominate his will. A person employed as a general agent and manager may be in a position to dominate his employer's will and a transaction between them be held to be unconscionable.¹¹

Gifts from clients to their attorneys can be maintained not only when the relation has ceased but the influence may rationally be supposed to have ceased also.¹² In order that the solicitor may retain the gift, a total absence of fraud, misrepresentation, influence and even suspicion must be shown, as also a severance of the confidential relation.¹³ The solicitor must further show that

5 *Auseri v. Raja Maneshar*, 3 ALJ 495 PC; *Sanwal v. Kurs*, 9 Lah. 470.

6 *Raghunath v. Veerjivandas*, 30 B 578, 589; see *Mariam v. Ibrahim*, 28 CLJ 306, 367; *Emma v. Silver Mining Co.*, 11 Ch. D 918, 937.

7 *Tate v. Williamson*, LR 2 Ch. 55.

8 *Tungabai v. Yeshvant*, 1945 PC 8.

9 *Tirath v. Harbhajan*, 158 IC 257.

10 *Satgur v. Harnarain*, 111 IC 817.

11 *Sant v. Ali*, 1946 O 129.

12 *Helman v. Loynes*, 4 DGM & G 270, 283.

13 *Morgan v. Minetti*, 6 Ch. D 638.

he has done his best to protect his client's interest.¹⁴ In the case of a sale by a client to a solicitor undue influence is presumed until the contrary is proved. The purchaser is bound to show that all the terms and conditions of the contract are fair, adequate and reasonable.¹⁵ The presumption continues as long as the relation of solicitor and client continues, or at all events until it can be clearly inferred that the influence has come to an end.¹⁶ There must be the utmost good faith and openness of dealing in a solicitor buying the property of one client for another.¹⁷ If the consideration be untruly stated in the deed, the conveyance will be set aside.¹⁸ A solicitor is not entitled to recover on a promissory note the consideration of which is a reward offered by a client who had no independent advice.¹⁹ An agreement to accept taxed costs only in order to lighten the burden on the client cannot be looked upon with disfavour.²⁰ Where a relation of pleader and client was subsisting between the parties, and the pleader asked for a present in addition to the fee in order to discharge a professional duty, the gift being made without any independent professional help was voidable.¹ The moment the relation of pleader and client is established there arises a presumption of influence which presumption will continue so long as the relation continues, and it will be difficult to support a gift by the client to the pleader, unless the pleader affords satisfactory proof rebutting the presumption and proves that his client was fully informed of all the material facts and that the transaction was a fair one.² Where a client promised to pay a reward to a friend, who was managing the suit and who agreed to pay half of that sum to the solicitor's clerk, the clerk was not entitled to recover the amount from the friend, whether the client knew of the arrangement or not.³ Advance of money by attorney to client to enable the latter to pay court fees is not vitiated by undue influence.⁴ It has been held, however, that a settled account between attorney and client, concluded by a mortgage of the client's property, cannot be reopened because of the mere subsistence of relation of attorney and client, unless sufficient cause can be shown. It is not incumbent on the attorney to prove that all the accounts on which the settled account is based are correct. An attorney may, however, be bound in certain circumstances to advise his client to take independent advice.⁵ In order to uphold a transaction of sale, in which the solicitor is

14 *Savery v. King*, 5 HLC 627, 655: (1843-60) All ER Rep 946: 10 ER 1046: 25 LJ Ch. 482.

15 *Pushong v. Munia*, 1 BLRAC 95.

16 *Wright v. Carter*, (1903) 1 Ch. 27: (1900-08) All ER Rep 706; *Demerara Bauxite Co. v. Hubbard*, 1928 AC 673, law fully stated.

17 *Hesse v. Briant*, 6 DGM & G 623.

18 *Uppington v. Bullen*, 2 Dr. & W 184.

19 *Brojendra v. Luckey*, 6 CWN 816.

20 *Wilson v. Hari*, 1934 B 250.

1 *Rajah Papamma v. Sita*, 5 MLJ 234.

2 *Fastreddi v. Unnava*, 120 IC 880; *Liles v. Terry*, (1895) 2 QB 679: (1895-99) All ER Rep 1018.

3 *Harivallabha v. Jivanji*, 26 B 689.

4 *Bahuria v. Bindeswari*, 159 IC 342.

5 *Shamaldhona v. Lakshimani*, 36 C 495; *Re Webb*.

the purchaser, he must prove (i) that the client was fully informed; (ii) that he had competent independent advice; and (iii) the price which was given was a fair one.⁶ As to the effect of the introduction of a new solicitor, see *Powell v. Powell*.⁷ A large gift from a client to a barrister who had been recently engaged in professional and legal matters was held to be bad.⁸ The Court views with great jealousy and suspicion attorney's special agreement with client for higher bounties and remuneration for the good and simple reason of the relationship of confidence between attorney and client where the attorney is in the position of a dominating party and which relationship the law has always characterised as being unusually susceptible to undue influence and peculiarly prone to breed unconscionable bargains.⁹

If a surgeon obtained an agreement from a patient conferring on him a large benefit, the agreement would be void.¹⁰ He will be ordered to refund what he has received from his patient in excess of his legitimate fees, because of the confidential relation between him and his patient.¹¹ An adoption has been held to be invalid because it was made under pressure exerted by people in a dominant position.¹² Where in order to secure a spiritual benefit in the next world a person made over the whole of his property to his spiritual adviser, held, the gift would be bad unless it could be shown that the transaction was carried through in perfect good faith and without undue influence.¹³

A parent stands in a fiduciary relation towards the child; any transaction between them by which any benefit is procured by the parent to himself, or to a third party, at the expense of the child will be viewed with jealousy by courts of equity, the burden will lie on the parent or third party claiming the benefit of showing that the child had independent advice from persons acting in his interest, and that he was removed from all undue influence when the gift was made.¹⁴ Where a mother transferred nearly the whole of her estate to her daughter the mere relation of daughter and mother in itself suggests nothing in the way of special influence or control.¹⁵ Where a sister married long ago and living in a separate house with her husband executes a deed of gift in favour of her brothers in respect of her share in her father's property under Muslim law and the document is attested by her husband the deed cannot be challenged on the ground of undue influence.¹⁶ Presumption of undue influence arises in the case of a transaction between a parent and a child who has just attained age prior to his complete emancipation.¹⁷ Thus, a lady just

6 *Wright v. Carter*, (1903) 1 Ch. 27; (1900-03) All ER Rep 706.

7 (1900) 1 Ch. 243.

8 *Brown v. Kennedy*, 33 LJ Ch. 342.

9 *Sandersons & Morgans v. Mohanlal*, AIR 1955 Cal 319.

10 *Dent v. Bennett*, 4 My & Cr. 269; 41 ER 105 LC; 8 LJ Ch. 125.

11 *Billing v. Southes*, 21 LJ Ch. 472.

12 *Ranganayaka v. Alwar*, 13 M 214.

13 *Mannu v. Umadat*, 12 A 523.

14 *Lakshmi v. Roop*, 30 M 169.

15 *Ismail v. Hafiz*, 33 C 773 PC.

16 *T. S. Mohamed v. A. Fathummal*, AIR 1978 Mad 302, 305.

17 *Archer v. Hudson*, 7 Beav 551.

coming of age joined her father as surety for the repayment of money. The bond was invalid on the ground of undue influence^{17a}; but an agreement between the father and the lawyer son was held not invalid.¹⁸ In order that the transaction may stand the parent shall be able to justify what he has done and to show that he had exercised no undue influence and that the child had adequate independent advice.¹⁹ "The onus extends to a volunteer claiming through his father and to any person taking with notice of the circumstances which raise the equity, but not further".²⁰

Under S. 88 of the Indian Trusts Act where a trustee,¹ executor,² agent,³ receiver,⁴ partner,⁵ director of a company,⁶ legal adviser,⁷ or other person standing in a fiduciary character in relation to another person,⁸ enters into any dealing under circumstances in which his own interest may be adverse to that of such persons and thereby gains for himself a pecuniary advantage, the transaction is void, and he must hold for the benefit of such other person the advantage so gained.⁹ A wife does not fall within the class of "protected" persons in respect of whom in certain relationships there is a presumption of undue influence.¹⁰ The fact that a wife remonstrates with her husband on his extravagance, or that a man loves his wife and gives her money, does not prove undue influence.¹¹ The doctrine of *Huguenin v. Baseley*¹² does not apply to the case of gifts or dispositions from a wife to a husband but it does to gifts or dispositions made by a young woman engaged to be married to an intended husband.¹³ A disciple ignorant, given to hemp smoking, was deprived of his property by his preceptor, the transaction being for inadequate consideration could be set aside.¹⁴

17a *Kempson v. Ashbee*, LR 10 Ch. 15: 44 LJ Ch. 195.

18 *Rehana v. Iqtidar*, 1943 A 184.

19 *Savery v. King*, 5 HLC 627, 655: (1843-60) All ER Rep 946; *Tucker v. Bennett*, 38 Ch. D 1, 9.

20 *Baindridge v. Burrows*, 18 Ch. D 188, headnote.

1 *Thomson v. Eastwood*, 2 AC 215, 236, refd. to in *Dougan v. Macpherson*, 1902 AC 197.

2 *Huguenin v. Baseley*, 14 Ves. 275: (1803-13) All ER Rep 1.

3 *Beningfield v. Baxter*, 12 AC 167.

4 *Nugent v. Nugent*, (1908) 1 Ch. 546.

5 *Boo Jinatboo v. Sha Nag*, 11 B 78.

6 *Liquidators etc. v. Coleman*, LR 6 HL 189 refd. to *Transval Lands Co. v. New Belgium & C. Co.*, (1914) 2 Ch. 488: (1914-15) All ER Rep 987; *Whaley Bridge Printing Co. v. Green*, 5 QBD 109; *Emma Silver Mining Co. v. Grant*, 11 Ch. D 918.

7 *Lloyd v. Coote*, (1915) 1 KB 242.

8 *Huguenin v. Basely*, 14 Ves. 275, cited in *Dent v. Beckett*, 4 M & Cr. 269: 8 LJ Ch. 125: 41 ER 105 LC: See *Smith v. Kay*, 7 HLC 750.

9 *Govind v. Sabitri*, 20 Bom LR 911.

10 *Mackenzie v. Royal Bank*, 151 IC 981 PC; *Howes v. Bishop*, (1909) 2 KB 390, 395.

11 *Sarfaraz v. Ahmad*, 1944 A 104.

12 14 Ves. 273.

13 *Bomaz v. Bomaz*, (1931) 4 Ch 289, 301-2: (1930) All ER Rep 479; *Tungabai v. Kesvant*, 1945 PC 8.

14 *Manbhari v. Sri Ram*, 1935 A 672.

When a stranger takes a gift tainted with the undue influence of a person in a fiduciary position with notice of the circumstances giving rise to the equity, the Court will compel him to give up the benefit;¹⁵ but not if that party be an innocent purchaser for value without notice of the imposition.¹⁶

9. Sub-section (2)(b).—The law stated in this sub-section is based on the principle of equity, namely, that where a purchase is made from a poor, ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity would relieve against the transaction. The Court of Chancery always throws upon the purchaser, when the transaction is found to have been effected in circumstances of poverty and ignorance of the vendor and absence of independent advice, the onus of proving that the purchase was fair, just and reasonable. It is on this principle that the rule against hard bargains, i.e., unfair and unconscionable bargains, has been extended to the cases of *purdanashin* women and to the dealings between professional moneylenders and agriculturists.¹⁷ Where two parties do not stand on an equal footing, one party suffers from physical or mental disability, there arises a presumption of fraud.¹⁸ "It cannot be held that a state of fear by itself constitutes undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement".¹⁹ Thus when a party executing a submission to arbitration was in fear of criminal proceedings being taken against him, but there was no suggestion that anyone took advantage of his state of mind to apply any pressure or exercise any influence to procure his consent, the submission was not void. Mere fear of criminal punishment does not constitute undue influence; therefore, if the defendant accepts money to screen the plaintiff from punishment he does not thereby exert undue influence. It is where there has been pressure or undue influence that money or security given under an agreement not to prosecute a criminal case will be ordered to be returned, the transaction being set aside. In other words, not only must the defendant have a dominant position but he must use it.²⁰ Thus where a landlord and his agent induced a tenant to enter into an agreement with them by means of various threats held out by them, *held*, the contract was entered into by reason of undue influence, the landlord being in a position to dominate the will of the tenant.¹ Where an old man of 100 years within a few days of his death gave his entire property to a stranger, who had no

15 *Narayan v. Buchraj*, 53 MLJ 842, 856, fold in *Rama v. Lingappa*, 69 MLJ 104; see *Huguenin v. Baseley*, 14 Ves 289: (1803-13) All ER Rep 1; *Bridgeman v. Green*, 2 Ves sen. 627 cited in *Morley v. Loughnan*, (1893) 1 Ch 736; *Rama v. Manikkan*, 1935 M 726; see *Petherperumal v. Ramaswami*, 1938 M 919.

16 *Karunamoyee v. Maya*, 1948 C 84.

17 *Amina v. Nathu*, 158 IC 973; see *Fry v. Lane*, 40 Ch D 312: (1886-90) All ER Rep 1084.

18 *Ram v. Bansidhar*, 1947 O 89.

19 *Gobardhan v. Jaikishan*, 22 A 224, the decision though under the old sec. would have been the same under the new.

20 *Amjadnessa v. Rahim*, 42 C 286; *Warisali v. Mohamed*, 46 IC 424.

1 *Bare Estate v. Anup*, 41 IC 387.

claim on him, without making any provision for his wife or children, the gift was held to fail, as the donee failed to discharge the heavy burden that lay upon him of establishing that the gift was induced by undue influence.² The mere fact that a person on account of his physical infirmity finds the help of another necessary for the proper management of his affairs is not, by itself, quite sufficient to enable the Court to presume that the latter was in a position to dominate the will of the former. Courts of equity will relieve a man only where he is unable to exercise his free will owing to his being under the domination of a more powerful will, or where he is tricked or cheated by the person who obtained some advantage or benefit from him.³ But where parties to the compromise of a suit were the father and two sons acting on the advice of a pleader on the one side and, on the other, a cripple, weak in body, feeble in mind, subject to various infirmities which would have the effect of undermining his will power, and acting without any legal adviser, the compromise was the result of the exercise of undue influence and could not stand.⁴

According to the general rules of English law, which have been applied in this country and extended to the case of *purdanashin* ladies, protection is given to persons whose disabilities make them dependent upon or subject them to the influence of others, although nothing in the nature of fraud or coercion may have occurred. Thus, the principle has been applied to the case of a person of weak intellect and old age and indifferent health,⁵ and also to ignorant agriculturists when they deal with professional moneylenders.⁶ In *Sher Singh v. Pirthi Singh*⁷ the plaintiff aged about 80 or 90 years, an illiterate villager and mentally in distress had none to look after him after death of his wife and the marriage of his two daughters. The defendants were his nearest relatives, who at one time formed a joint family. They looked after his daily needs and managed his cultivation. He made a gift of all his transferable properties in favour of the defendants to the exclusion of his daughters. They took a prominent part in the execution of the deed of gift. Held: undue influence vitiated the deed of gift and was liable to be cancelled.

10. *Purdanashin ladies*.—The Judicial Committee have observed: “The Courts in India have always been careful to see that deeds taken from *purdanashin* women have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about”,⁸ in other words, “those who rely upon them (deeds) should satisfy the court that they have been explained to, and understood by, those who execute them”.⁹ The onus of proof is on the

² *Safdar v. Nur*, 118 IC 737.

³ *Venkatrama v. Krishnammal*, 52 MLJ 20.

⁴ *Nandlal v. Ram*, 103 IC 80.

⁵ *Ram v. Rajkumar*, 55 C 285.

⁶ *Ghasi v. Gangabeesan*, 83 IC 239; *Muthukrishna v. Sankaralingam*, 86 M 229. 241 cited.

⁷ AIR 1975 All 259.

⁸ *Garash v. Bhuggobutty*, 18 MIA 419, 431.

⁹ *Sudhist v. Sheoharat*, 7 C 245 PC; *Sumsuddin v. Abdul*, 31 B 165; *Kubra v. Ajodhia*, 7 ALJ 445; *Thakurain Tara v. Maharsja Chandra*, 54 CLJ 431 PC.

party seeking to enforce the document against a *pardanashin* lady.¹⁰ Those who seek to affect *pardanashin* women with liability under an instrument are bound to prove that they had knowledge of the nature and character of the transaction, that they had some independent and disinterested adviser in the matter, and that they executed the instrument fully understanding what they were about in doing so".¹¹ A court when dealing with the disposition of her property by a *pardanashin* woman ought to be satisfied that the transaction was explained to her, specially in a case where, without legal assistance, for no consideration, she executed a document written in a language she did not understand, which deprived her of all her property.¹² Accordingly where an instrument has not been properly explained so that she did not understand its conditions and effects,¹³ or did not know what liabilities she was incurring,¹⁴ the transaction cannot stand. The extent and character of the explanation required must depend on the circumstances.¹⁵ To ascribe to a *pardanashin* woman ignorance, weak-mindedness and incapacity to understand her affairs because of her living in seclusion, or sitting behind the *purda*, is impossible.¹⁶ But even in England a release executed by two ladies in error as to their true position and without independent advice was held not binding.¹⁷ Undue influence will be presumed in the case of *pardanashin* ladies.¹⁸ Therefore it is for the person claiming the benefit of any such disposition to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act. If she is illiterate, it must have been read over to her, if the terms are intricate, they must have been adequately explained, and her degree of intelligence will be a material factor. But independent legal advice is not essential.¹⁹ Surrender by a female owner requires legal advice. Where undue influence is alleged it is necessary to examine all the circumstances of the case.²⁰ The rule that a *pardanashin* lady should have independent advice is not inflexible. Even if no advice is taken by her, the document will not be invalid, unless it was shown that independent advice would have affected the execution of the document by the lady.¹ If a transaction is found to be unfair

10 *Lala Kalyan v. Ahmad*, 60 CLJ 128 PC.

11 *Behari v. Habiba*, 8 A 267; *Sajjanpal v. Harnarayan*, 157 IC 192; *Kalyanmal v. Ahmaduddin*, 151 IC 45; *Lala Kalyan v. Ahmad*, 60 CLJ 128 PC; *Karunamayee v. Maya*, 1948 C 84.

12 *Ashgar v. Delroos*, 3 C 324 PC; *Amarnath v. Achan*, 14 A 420 PC.

13 *Shambati v. Jago*, 29 C 749 PC; *Mirza Sajjad v. Nawab Wazir*, 39 IA 156; *Saleha v. Khan*, 1950 Pat 247.

14 *Annoda v. Bhuvan*, 28 C 546 PC; *Mariam v. Sakina*, 14 A 8; *Achhan v. Thakurdas*, 17 A 125.

15 See *Sham v. Dah*, 29 IA 132, 137.

16 *Hukam v. Sakigram*, 159 IC 405.

17 *Re Garnett*, 31 Ch D 1.

18 *Nisar v. Ashrafunnissa*, 35 IC 395.

19 *Ramanamma v. Viranna*, 61 MLJ 94, 101 PC; *Muhammad v. Masihan*, 125 IC 158; *Muhammad v. Umatulla*, 39 IC 798, if the plaintiff be a *pardanashin* lady the onus rests upon the defendant.

20 *Karunamayee v. Maya*, 1948 C 84.

1 *Ram v. Gobind*, 5 Pat 646, 662.

the Court will not make it fair by altering the terms.² A mere declaration by the settlor that she has not understood what she was doing is not by itself conclusive.³ In case of an agreement effecting a compromise of litigation, it is sufficient if the general result of the compromise has been understood, and if competent and disinterested people have given advice to the lady that the deed should be executed.⁴

Law throws around a *purdanashin* lady a special cloak of protection. The burden of proof in such a case rests not with those who attack but with those who found upon the deed. There is no absolute rule of law that a gift by a *purdanashin* lady cannot stand unless it is proved that the lady had independent advice.⁵

As has been fully explained in *Satis v. Kalidasi*,⁶ the Court, when called upon to deal with a deed executed by a *purdanashin* lady, must satisfy itself upon evidence, first that the deed was actually executed by her with full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction in which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter. Cases fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character; and secondly, cases where the person who seeks to enforce the deed was an absolute stranger. In the former class of cases the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. If confidence is reposed and it is abused the Court will grant relief. Advice given after the event, when the supposed contracting party is already bound, is of no effect.⁷

Where the relationship between a party and a woman was not such as to enable him to dominate the latter's will, and no confidence was reposed in or betrayed by him, and she had neighbours and relations to assist her, and with a full knowledge of what she was doing she alienated the property to him, she could not then have the alienation set aside on the ground of undue influence.⁸ Where, however, the facts disclose a confidential relation between the parties and also establish that the deed was harsh and unconscionable, the burden of proving undue influence rests on the party seeking to support the deed.⁹ Thus, in a case where the legal adviser to a *purdanashin* lady acted the part of a moneylender to her and procured the execution by her of a mortgage bond

² *Nathusa v. Mohammad*, 1939 N 159.

³ *Faridunnisa v. Mukhtar*, 52 IA 342.

⁴ *Sunitabala v. Dhara*, 46 IA 272, 278.

⁵ *Kali v. Ram*, 36 A 81 PC; *Faridunnisa v. Mukhtar*, 52 IA 342, 350 fold in *Lala Kundan v. Musharrafi*, 38 Bom LR 783 PC; *Tara v. Chandra*, 34 Bom LR 222 PC; *Iftikhar v. Sikandar*, 148 IC 528.

⁶ 34 CLJ 529, see the large number of authorities reld. to; *Krishna v. Nagendrabala*, 34 CLJ 338.

⁷ *Mackenzie v. Royal Bank*, 151 IC 981 PC.

⁸ *Purna v. Sarojini*, 60 CLJ 25.

⁹ *Sri Thakurji v. Ram Dei*, 59 MLJ 14 PC.

to secure its repayment, the onus lay upon the mortgagee to show that this lady understood the effect of the deed and that the transaction was fair.¹⁰ In a transaction between the mother and her daughters a heavy burden lies on those who rely on the documents.¹¹ Where a *pardanashin* lady sought to recover from her husband company's paper which she alleged that she had endorsed and handed over to him for the purpose of receiving the interest thereon and which the husband alleged that he had purchased from his wife, the burden of proving the *bona fides* of the purchase rested upon the husband, even though the wife may fail affirmatively to establish the precise case alleged by her.¹²

Where a family settlement is impeached by a *pardanashin* lady on the ground of fraud on the part of kinsmen and it is shown that the woman is illiterate and lacking in business capacity, the question which the court has to consider is not whether she knew what she had done, but how her intention to act was produced; whether all that care and providence was placed round her as against those who advised her which from their situation and relation with respect to her they are bound to exert on her behalf.¹³ Where a lady living with her husband executes a mortgage for her husband's debt, it must be strictly proved that the mortgage was fairly taken, or that the lady executing it was a free agent, was duly informed of what she was about.¹⁴

The wife of a man in humble position who goes about hiding her face in public is not a *pardanashin* in the strict sense of the term.¹⁵ A woman who has no objection to communicate in matters of business with men other than members of her own family, to go to Court and attend at the Registrar's office in person, cannot be regarded as a *pardanashin* woman.¹⁶ Where it was attempted to be made out that one Mrs. Hodges was a *pardanashin* the Privy Council rejected the contention. The protection granted to *pardanashin* ladies is their personal privilege.¹⁷

11. Unconscionable bargains.—'Hard' and 'unconscionable' are loose expressions which mean little or nothing unless they are properly applied.¹⁸ Courts in this country grant relief where the contract is tainted with fraud in the broad sense in which the term is understood in the Courts of Equity in England.¹⁹ The most common case of interference of a court of equity in England is that of an expectant heir, reversioner or remainderman, who is

10 *Lala Mahabir v. Taj Begam*, 19 CWN 162 PC.

11 *Izhar v. Ansar*, 1939 ALJ 662.

12 *Moonshee Buzloor v. Shumsoonnissa*, 11 MIA 551.

13 *Shri Kishanlal v. Kashmiro*, 14 ALJ 1236 PC; *Huguenin v. Baseley*, 14 Ves 273; (1803-13) All ER Rep 1; *Moxon v. Payne*, LR 8 Ch 881 refd. to.

14 *Badiatannessa v. Ambica*, 18 CWN 1133; *Kessowji v. Hurjivan*, 11 B 566.

15 *Hukam v. Saligram*, 159 IC 405; *Fayyazuddin v. Qutabuddin*, 116 IC 899.

16 *Ismail v. Hafiz*, 33 C 773 PC; *Ismail v. Amirbibi*, 4 Bom LR 146; *Govindi v. Ganga*, 147 IC 1256.

17 *Shiba v. Tincouri*, 183 IC 855.

18 *Adams v. Weare*, 1 Bro CC 587.

19 *Lalli v. Ram*, 9 A 74; *Kriparam v. Samiuddin*, 25 A 284; *Balkishan v. Madanlal*, 29 A 303.

just of age, his youth being treated as an important circumstance.²⁰ In the case of a security taken from a person just of age, living under the influence and in the house of another person with a relationship subsisting between them, which constitutes anything approaching to the relation of guardian and ward or of standing in *loco parentis* to the surety, the court will not allow such security to be enforced against the person from whom it is taken, unless the court be perfectly satisfied that the security was given freely and voluntarily.¹ The burden is thrown upon a person dealing with an expectant heir to show that he has not used this position to obtain an unfair advantage.² In England equity relieves against "catching bargains with expectant heirs," as fraud is always presumed or inferred from the circumstances in such bargains.³ Any transaction between them will be set aside unless the person discharges the onus of showing that he did not exercise undue influence, the party exercising such influence may, nevertheless, be entitled to compensation.⁴ Thus, a bond⁵ or a deed⁶ of a man who has just attained majority, who was not fully acquainted with his rights and had no independent advice and executed it without any consideration whatever, has been set aside. In *Deorao v. Ambadas*⁷ it has been held that a bargain is unconscionable when it is such that no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other. The question whether a particular bargain is unconscionable or not is one of fact and not of law. No undue influence can be inferred from the fact that the mortgagor used to eat opium and was a simpleton and the mortgagee's son was a pleader who was helping the mortgagor.⁸ The circumstance that a grandfather made a gift of a portion of his properties to his only grandson a few years before his death is not on the face of it an unconscionable transaction.⁹

12. Moneylending transactions.—The question has arisen whether the rate of interest exacted does not amount to a hard or unconscionable bargain such as a court of equity will give relief against. The decision in *Kamini Sundari v. Kali Prossunno*¹⁰ shows that in India courts may apply to cases, in which the dealings sought to be impugned were not with expectant heirs, reversioners, or remaindermen, the doctrine or principles which the courts of equity in England have applied to hard or unconscionable bargains with expectant heirs.

20 *Fry v. Lane*, 40 Ch D 312: (1886-90) All ER Rep 1084.

1 *Espey v. Lake*, 10 Hare 260; *Archer v. Hudson*, 15 LJ Ch 211.

2 *Lala Balla v. Ahad*, 48 IC 1 PC.

3 *Ayllesford v. Morris*, LR 8 Ch 484: (1861-73) All ER Rep 300.

4 *Raja Mokham v. Raja Rup*, 15 A 352 PC reld. to in *Parbhu v. Puttu*, 1 Luck 144

5 *Chedambara v. Renj*, 1 IA 251.

6 *Premnarain v. Parasram*, 4 IA 101.

7 48 IC 952 reld. to in *Ganpatrao v. Lazmichand*, 77 IC 640, 648.

8 *Jaswant v. Gajan*, 112 IC 602.

9 *Subhas v. Ganga*, AIR 1967 SC 878, 884.

10 12 C 225, 238 PC; see *Mothoor v. Soorendro*, 1 C 108; *Chunni v. Rup*, 11 A 57 affmd. in 20 IA 127; see as to what constitutes an unconscionable bargain, *Carvalho v. Nurbibi*, 3 B 202.

But in *Kesavulu Naidu v. Arithulai Ammal*¹¹ it has been laid down that an Indian Court cannot reduce the rate of interest simply on the ground that it is unconscionable. The mere fact that the rate of interest is exorbitant will not be sufficient to entitle the defendant to exemption from liability unless the rate was so extortionate as to involve the conclusion that the party was the victim of a severe imposition.¹² The court may inquire whether the agreement to pay interest at a high rate was the result of the lender being in a position to dominate the will of the borrower.¹³ If a gift by deed be a true, well understood and voluntary act of the donor, it cannot be treated as void on the ground of undue influence merely because it is such as could not be expected from a man of ordinary prudence.¹⁴ Urgent need of money does not of itself place the lender in a position to dominate the will of the borrower.¹⁵ Where however on account of poverty and necessity a party is at the mercy of the lenders who use that position to their own advantage, the borrower is entitled to relief,¹⁶ so that if a moneylender be in a position to dominate the will of the borrower the case will fall under illust. (c), whereas if it be a case where the borrower is forced by necessity to agree to a loan at an exorbitant rate, it will be covered by illust. (d). Where the property of a *purdanashin* lady was about to be sold and the plaintiff promised to lend her the necessary amount on easy terms but failed to do so, and on the last day of the sale she executed a mortgage in his favour on onerous terms, the lender was held to be in a position to dominate the will of the borrower who was in a state of helplessness brought about largely by his tactics and the conditions were also of a harsh and unconscionable nature.¹⁷ Illust. (c) does not mention all the necessary facts and has to be supplemented. There would be a case of undue influence if the debt is of a large amount and the moneylender puts pressure on the debtor for its repayment.¹⁸

In order to determine whether the rate of interest is high or not all the circumstances, such as time and risk, have to be considered. There can be no standard rate on a personal loan without security.¹⁹ The mere fact of a person being indebted will not establish undue influence.²⁰ The court will afford no protection to persons who wilfully and knowingly enter into an extortionate

11 36 M. 533; *Din Muhammad v. Badrinath*, 120 IC 417, Usurious Loans Act considered; *Maneshar Baksh v. Shadi Lal*, 31 A 386 PC; *Diala v. Sargha*, 114 IC 693; *Aziz Khan v. Duni Chand*, 48 IC 933; *Lala Balla v. Ahad*, 21 Bom LR 558 PC; *Poosathurai v. Kannapa*, 47 IA 1.

12 *Satish v. Hem*, 29 C 83; *Sital v. Parbhu*, 10 A 535; *Ghasi v. Gangabissan*, 83 IC 239.

13 *Rukmina v. Mohib*, 153 IC 695.

14 *Amba v. Shirnivasa*, 44 IC 483.

15 *Kali v. Protap*, 17 CLJ 221; *Sundur v. Sham*, 34 C 150 PC; *Lala v. Harijan* 96 IC 538.

16 *James v. Kerr*, 40 Ch D 449.

17 *Ghansham v. Masjidi*, 83 IC 1019.

18 *Raza v. Ganesh*, 77 IC 383.

19 *Din Muhammad v. Badrinath*, 120 IC 417.

20 *Mahadeo v. Kisanlal*, 68 IC 597.

and unreasonable bargain, unless it be shown that it was in ignorance of the unfair nature of the transaction that the contract was entered into. The case of a female debtor in a fiduciary relation to the creditor and of an expectant heir are exceptions to the general rule.¹ A moneylending transaction, though improvident, should be enforced as also the interest, though high.² This is of course a statement of the law as it was before the Usurious Loans Act, 10 of 1918, and it still is in cases to which that Act is not applicable.³ This Act applies to a mortgage executed after the Act came into operation. Under it the court can reopen a transaction if it has reason to believe that (1) the interest is excessive, (2) the transaction is substantially unfair.⁴ 24 p.c. simple interest has been reduced to 18 under the Act.⁵ The Punjab Chief Court Circular does not authorise the reduction of interest in the absence of undue influence.⁶ Under the U.P. Agriculturists' Relief Act the court cannot interfere with the stipulation regarding payment of interest but may reduce the rate.⁷ A bargain in which the reward is largely in excess of the expenses incurred is not necessarily an unconscionable bargain.⁸ It is incumbent on those who support a mortgage made by the manager of joint Hindu family,⁹ or by the father of a joint Hindu family,¹⁰ to show that not only there was a necessity to borrow but that it was not unreasonable to borrow at a high rate of interest. The Indian law does not recognise the English principle of equity which gives relief to a debtor whenever the court considers the rate of interest unduly high. The law in India is that unless the creditor can place himself within the four corners of the section he is entitled to no relief,¹¹ i.e., it must be shown that the lender took advantage of the necessity and the position of the borrower and imposed unconscionable terms.¹² From the fact that the vendor was in a distressed state of mind at the time of sale it is impossible to infer the exercise of undue influence.¹³ Undue influence of a third person, e.g., a dancing girl, over the borrower is no defence to the creditor's claim.¹⁴

1 *Umesh v. Golap*, 31 C 233; *Chatriug v. Whitchurch*, 32 B 208; *Debi v. Ganga*, 32 A 589; *Chiranjī v. Dost*, 79 IC 995; *Lakhi v. Pear*, 39 IC 106; *Muhammad v. Swami*, 48 IC 32; *Kesavulu v. Arithulai*, 36 M 533; *Naraindas v. D' Cruz*, 10 IC 984; *Pannusamy v. Nandimuthu*, 33 MLJ 302; *Ramalingam v. Subramania*, 50 M 614; *Aziz Khan v. Dunichand*, 23 CWN 130 PC; *Ibney v. Gulkandi*, 164 IC 325; *Stiffles v. Martin*, 39 CWN 174 decision to the contrary in *Madho v. Kashi*, 9 A 228 and *Poma v. Gillespie*, 31 B 348 may be regarded as overruled.

2 *Risal v. Manohar*, 102 IC 283.

3 *Viswanathan v. Aye*, 98 IC 11.

4 *Ram v. Heramba*, 56 C 960.

5 *Kamla v. Hasan*, 1939 All 329.

6 *Diala v. Sarga*, 102 IC 707.

7 *Tara v. Collector*, 183 IC 710.

8 *Marina v. Valliuri*, 109 IC 87.

9 *Nazir v. Raghunath*, 46 IA 145 cited in *Ram v. Ram*, 41 A 609.

10 *Bhikhi v. Kodai*, 17 ALJ 580, *Hurronath v. Randhir*, 18 C 311 PC referred to.

11 *Bakunki v. Karapa*, 42 IC 680; *Ganeshi v. Mandle*, 10 IC 249; *Chota Nagpur Banking Association v. Bhagwat*, 69 IC 697; *Maung Mya v. Mossaji*, 24 IC 67.

12 *Kamla v. Ram*, 51 IC 496.

13 *Inder v. Dyal*, 72 IC 1032.

14 *Inder v. Dyal*, 72 IC 1032.

The fact that the mortgagor is a young wastrel who will squander the money borrowed is no proof of undue influence by the lender.¹⁵ No hard and fast rule can be laid down as to what is a reasonable rate of interest.¹⁶ On the question of reduction of interest, Their Lordships of the Privy Council have held in *Aziz Khan v. Dunichand*¹⁷ that it is difficult for a court of justice to give relief on grounds of simple hardship in the absence of any evidence to show that the moneylender had unduly taken advantage of his position, even when a transaction appeared to be undoubtedly improvident; it has been held in subsequent cases that the court has no option but to allow the rate of interest stipulated in the bond.¹⁸ Where there has been undue influence,¹⁹ or the suit has been one for specific performance,²⁰ the court is entitled to give relief.

The courts do not lean towards compound interest, they do not award it in the absence of a stipulation, but where there is a clear agreement for its payment, it is, in the absence of disentitling circumstances, allowed.¹ If the contract to pay compound interest has not been brought about by undue influence on the part of the creditors, or if they had not unduly taken advantage of their position in the matter, such a stipulation cannot be disallowed merely on the ground that the debtor did not realise that the interest would be so much when he entered into the bargain.² Thus the rate of interest has been reduced from 12% compound to simple interest because of the presence of undue influence.³ See S. 73 note 38, S. 74 notes 6-11.

13. Sub-section (3).—In *Mahomed v. Hosseini*⁴ the Privy Council has laid down four requirements of undue influence, namely (i) whether the transaction was a thing which a right-minded person might be expected to do; (ii) whether it was improvident; (iii) whether it was a matter requiring a legal adviser; and (iv) whether the intention of making a gift originated with the donor. Under it the burden of proving that the contract is not induced by undue influence lies upon the persons who were in a position to dominate the plaintiff's will.⁵ There is a difference between a case of wills and a case of a contract or of gift. As regards the burden of proof in the case of wills it is for the person who impeaches the will as having been executed under undue influence to set up and prove the undue influence. But in the case of gifts or settlements,

15 *Sardari v. Abdul*, 90 IC 39.

16 *Bindeshri v. Jagprasad*, 69 IC 758.

17 23 CWN 130 PC.

18 *Ektar v. Wajuddi*, 23 CWN 380; *Bejoy v. Satish*, 24 CWN 444; *Bhutnath v. Ramanath*, 48 C 93; *Nabin v. Dudu*, 30 CWN 83; *Jewanlal v. Nilmani*, 7 Pat 305.

19 *Dhanipal v. Raja Maneshwar*, 33 IA 118.

20 *Jewanlal v. Nilmani*, 7 Pat 305.

1 *Hari v. Ranji*, 28 B 371, 377; *Ganga v. Land Mortgage Bank*, 21 C 366; *Lala Balla v. Ahad*, 21 Bom LR 558 PC; *Umesh v. Golap*, 31 C 233; *Rajkumar v. Girindra*, 41 CLJ 453.

2 *Harendra v. Debendra*, 54 IC 558.

3 *Bhola v. Kishore*, 20 IC 8.

4 15 IA 81 fold in *Samdarali v. Nur*, 118 IC 737; *Abdur v. Aynona*, 1937 C 492.

5 *Parth v. Patil*, 1 Luck 144.

where the donee is shown to have been a person in real or apparent authority, or in a fiduciary relationship to the donor, or where the donor's mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress, the onus is upon the donee to prove that it was not brought about by undue influence.⁶ The sub-section applies to a transaction which on the face of it, or on evidence adduced, appears to be unconscionable. Where there was nothing in a *kabuliat* to show that it was a hard bargain, it was for the expectant heir to prove that it was executed under undue influence. The fact that a compoundable criminal case was pending between the parties and the prosecution was ready to compound the offences and to withdraw the charges if the *kabuliat* was executed, would not lead to the necessary inference that the prosecution was in a position to dominate the will of the executant and used that position to obtain an unfair advantage over the executant.⁷

Where a widow without independent legal advice executes a deed of gift in favour of a male relation a few days after she was taken to Madras from her village, the deed is liable to be set aside on the ground of undue influence.⁸ It is not proper to contend that the rule of equity is restricted to cases where strictly or technically fiduciary relationship is established.⁹ The rule must apply to all variety of relations in which the court is satisfied that the possibility of the exercise of domination and influence exists, *i.e.*, the relation of active confidence justifying the raising of the presumption of undue influence. The relation of paramour and mistress¹⁰ may be included in such cases.¹¹ By this sub-section three matters are dealt with. In the first place, the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges which is that of the *onus probandi*. The burden of proving that the contract was not induced by undue influence lies upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relation of the parties. Thus, where a borrower is *sui juris*, has the full power of burdening his estate, the Court cannot grant relief under this section even though the bargain has been unconscionable, until the initial fact of a position to dominate the will have been established.¹²

It is not true to say that any confidential relation, *e.g.*, mother and son, between the donor and donee is sufficient to set up a presumption against the

⁶ *Venkatarama v. Krishnammal*, 52 MLJ 20.

⁷ *Kallu v. Parbhu*, 28 IC 438.

⁸ *S. Rathnam Naidu v. Kannu Ammal*, AIR 1972 Mad 413.

⁹ See *Huguenin v. Baseley*, (1803-13) All ER Rep 1; 2 Wh & TLC citing *Dent v. Bennett*, 4 My & Cr 268, 276, 8 LJ Ch 125; 41 ER 105 LC.

¹⁰ *James v. Holmes*, 6 LT 589; *Ram v. Sital*, 1948 P 180.

¹¹ *Shivangawa v. Basan*, 40 Bom LR 132.

¹² *Raghunath v. Sarju*, 51 IA 101; *Abdul v. Khirode*, 42 C 690 wrongly decided; *Santhappa v. Santhiraja*, (1938)1 MLJ 676; see *Parbhu v. Patlu*, 95 IC 995.

validity of the gift.¹³ In order to establish undue influence three things must be established: (a) that one party was in a position to dominate the will of another party, (b) that the former used the influence to the prejudice of the latter, and (c) that the transaction is unconscionable. Mere proof of the first element is not enough.¹⁴ Where a donor living at the house of his sister gives his entire estate to her son, excluding his wife and son, the gift calls for severe scrutiny.¹⁵ Where a mortgage deed provided that redemption would take place after 40 years, the term may be unconscionable, but this fact alone will not entitle the mortgagor to avoid the contract and sue for redemption, unless he can prove that the contract was entered into under undue influence.¹⁶ There can be no question in a mercantile contract of one party being able to dominate the will of the other.¹⁷

In order to uphold a gift made to a person standing in a confidential relation, the donor must have had competent and independent advice in conferring it,¹⁸ but advice of that kind is not necessary when the confidential relation has come to an end and the donor is no longer subject to its influence.¹⁹ Independent advice means that some independent person free from the taint of relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and consequences of the act.²⁰ Independent legal advice required to rebut the presumption of undue influence does not mean in every case the advice of a lawyer, but it must be the advice given with a knowledge of all relevant circumstances, and must be such as a competent and honest adviser would give if acting solely in the interest of the donor.¹

The mere fact that one person is the servant of the other is not sufficient, in the absence of evidence, to show that undue influence was used.² A servant of a minor status, *e.g.*, a *karinda*, cannot be presumed, without distinct evidence, to be in a position to dominate the will of his employer.³ Where a poor zemindar borrowed money from a moneylender with whom he had dealt for a considerable period, the latter was in position to dominate the will of the former and the stipulation to pay compound interest could not stand.⁴ Where a harsh and unconscionable bargain is entered into by the tenant for no apparent reason at all, the court is justified presuming that undue influence

13 *Re Coomber*, (1911)1 Ch 723, 726: 80 LJ Ch 399.

14 *Poosathurai v. Kannappa*, 47 IA 1 cited in *Santhappa v. Santhiraja*, (1938)1 MLJ 676; *Mohan v. Kashi*, 1950 N 71; *Venkatarama v. Krishnammal*, 52 MLJ 20.

15 *Hajra v. Dost*, 1947 A 180.

16 *Nihal v. Shib*, 52 IC 542, see note 3.

17 *Ralli Bros. v. Bhagwan*, 1945 L 35.

18 *Rhodes v. Bate*, LR 1 Ch 252: (1861-73) All ER Rep 805.

19 *Mitchell v. Homfray*, 8 QBD 587, case of gift by a patient to doctor.

20 *Re Coomber*, (1911)1 Ch 723, 730: 80 LJ Ch 399.

1 *Iohe v. Allie*, 115 IC 733, PC.

2 *Daulat v. Gulabrao*, 88 IC 295.

3 *Dalpat v. Ahmad*, 48 IC 17.

4 *Mansa v. Umra*, 11 IC 198.

was brought to bear upon him by the landlord.⁵ Inadequacy of consideration has only a remote bearing in a suit to set aside a lease on the ground of undue influence. It must be proved that the lessee was in a position to dominate the will of the lessor.⁶ In the absence of evidence to prove that when the contract was entered into the plaintiffs were in a position to dominate the will of the defendant and to exercise undue influence over him to induce him to enter into the contract, the plaintiffs are entitled to interest at the rate stipulated in the contract.⁷ When one person deals with another who has just attained majority and is inexperienced, the burden of proving that the contract is made in good faith and for adequate consideration lies on the person who takes the benefit of the contract.⁸ When an expectant heir borrows money at a very high rate of interest the presumption of undue influence arises.⁹ Undue influence is not a matter always capable of direct proof and must depend by its very nature on the conclusion to be drawn from the entire circumstances in which the transaction had its origin.¹⁰

The three stages for consideration of a case of undue influence were expounded in the case of *Raghunath Prasad v. Sarju Prasad*¹¹ in the following words:—

“In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached—namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

“Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?”

It must also be noted that merely because the parties were nearly related to each other no presumption of undue influence can arise. As was pointed out by the Judicial Committee of the Privy Council in *Poosathurai v. Kannappa Chettiar*¹²—

“It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the

Kashi v. Durga, 1 Pat LJ 604; *Bara Estate v. Annup*, 41 IC 387.

Gafur v. Sharif, 1932 PC 202.

Bashirulla v. Meajan, 92 IC 593.

⁸ *Sheocharan v. Channulal*, 132 IC 452.

⁹ *Nasir Din v. Balla Mul*, 25 IC 719.

¹⁰ *Amba v. Shrinivasa*, 44 IC 483.

¹¹ 1 A 101.

¹² 47 IA 1.

will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used wisely, judiciously, helpfully. But, whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, 'undue'."

The law in India as to undue influence as embodied in section 16 of the Contract Act is based on the English Common Law as noted in the judgment of this Court in *Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd.*¹³ Generally speaking, the relations of solicitor and client, trustee and *cestui que trust*, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. Section 16(2) of the Contract Act shows that such a situation can arise wherever the donee stands in a fiduciary relationship to the donor or holds a real or apparent authority over him.¹⁴

14. **Lapse of time.**—Delay and acquiescence will not bar the donor's right to equitable relief unless he knew that he had the right or, being a free agent at the time, deliberately determined not to enquire what his rights were or to act upon them¹⁵; i.e., lapse of time is not a bar in itself, there must be conduct amounting to confirmation or ratification of the transaction.¹⁶

15. **Onus.**—Under sub-section (3) the burden of proving absence of undue influence can lie on the defendant only in the event of the plaintiff discharging the initial onus of satisfying the court that the defendant was in a position to dominate the will of the plaintiff¹⁷; but the circumstances of a case may make an exception to that general rule, e.g., where a person stands in relation to another in a position of active confidence or in a position to dominate the will of another.¹⁸ Generally speaking, the relation of solicitor and client, trustee and *cestui que trust*, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which a presumption of undue influence arises.¹⁹ In an action to set aside a contract on the ground of undue influence the initial onus, therefore, is on the party seeking relief to establish that the other party to the contract was in a position to dominate his will. Until it has been so established, the burden does not lie upon the other party of proving that the contract was not induced by undue influence.²⁰ Where undue influence is not seriously disputed the burden lies upon him who denies it to show that it was not used.¹ The sub-section presupposes that one of the persons is in a position to dominate the will of another. Where this

13 AIR 1963 SC 1279, 1290.

14 *Subhas v. Ganga*, AIR 1967 SC 878, 880, 881.

15 *Lakshmi v. Roop*, 30 M 169.

16 *Alloard v. Skinner*, 36 Ch D 145, 181, 186: (1886-90) All ER Rep 90; *Wright v. Vanderplank*, 8 DGM & G 133: 25 LJ Ch 753: 44 ER 340; see next sec. note.

17 *Balbhadra v. Dhanpat*, 80 IC 213; *Bahore v. Juro*, 160 IC 1073, 1936 P 78; *Anupa v. Bhagwant*, 179 IC 285.

18 *Palanivelu v. Neelavathi*, 65 CLJ 295 PC.

19 *Subhas v. Ganga*, AIR 1967 SC 876.

20 *Gafur v. Mohammad*, 56 CLJ 55 PC; *Kotumull v. Dur Muhomed*, 136 IC 525.

1 *Azimunnissa v. Straj*, 1934 A 507.

is not the case, the rule regarding the burden of proof enacted in the sub-section does not apply.² Where, however, a contract is, on the face of it, unconscionable it is the duty of the party seeking to enforce it to prove that the contract was not induced by undue influence.³ The law requires that the party who sets up undue influence must, to start with, establish that there was active confidence between the person executing the document and the person under whose influence the document is said to have been executed.⁴ In the case of gifts to near relations there will be no presumption of undue influence, the burden of proof does not lie on the donee, nor in the case of a female donor is it necessary to show that she had independent advice.⁵ In the case of a sale by a person, young in age and in distressed circumstances but not without advice or means of information, of an estate actually vested in him, the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. But, in the case of sales by expectant heirs of reversionary interests, the onus of proof is shifted upon the purchasers.⁶ In a suit on a promissory note executed by a young man, the onus lies upon the defendant to prove that the plaintiff advanced the loan for an immoral purpose, or that the promissory note was obtained from the defendant by the exercise of undue influence by the plaintiff.⁷ When the people who are nursing an elderly invalid got a transfer of practically the whole of his remaining property in their favour to the complete exclusion and without the knowledge of the heir, it is for them to prove the *bona fides* of the transaction.⁸ The elder brother and manager of a Hindu family stands in a fiduciary relation to his weak-witted younger brother; the burden of proving the absence of undue influence in procuring a deed of gift, from the younger brother, of his property is on the elder brother. As has been observed by the Privy Council⁹ "when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring a suit." The same principle applies equally to a case of undue influence. Under Art. 91 the period within which a suit is to be brought is 3 years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him.¹⁰ Where the defendants agreed to give up the status of inamdars and to pay a rent of double the amount formerly payable for the land, this apparently for no consideration whatever, the contract was unconscionable on the face

2 *Abdul v. Beni*, 171 IC 605.

3 *Bara Estate v. Anup*, 41 IC 337; but see *Bulaqi v. Abdul*, 1933 L 682.

4 *Ram v. Naraina*, 62 IC 215.

5 *Ko San v. Thaung*, 46 IC 738.

6 *Mir Azimuddin v. Ziauddin*, 6 B 309.

7 *Ghazaffar v. Mahabir*, 17 IC 309; see *Sital v. Parbhu*, 10 A 535; *Lyon v. Home*, LR 6 Eq. 655; 37 LJ Ch. 674.

8 *Moung Aung v. Tha*, 144 IC 673.

9 *Rahimboy v. Turner*, 20 IA 1.

10 *Trihwan v. Someshwar*, 130 IC 119.

of it; when such a contract was made by the tenants with their zemindars, the latter was in a position to dominate the will of the former, the burden of proving that the contract was not induced by undue influence lay upon the zemindars.¹¹

17. "Fraud" defined.—"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion as a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) A sells by auction to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A—"If you do not deny it, I shall assume that the horse is sound". A says nothing. Here, A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

1. Fraud.—Fraud has a wider meaning, far wider than the definition given in the Act. Thus, a decree may be set aside for fraud.¹² "Fraud is infinite in variety...and it is the fraud, not the manner of it, which calls for the interposition of the Court".¹³ It has been classified under five heads in a leading case.¹⁴ The intention to deceive is not necessarily an intention to

¹¹ *Rajah of Venkatagiri v. Rachapoody*, 4 IC 1114, but see *Promoda v. Kinno*, 4 IC 495.

¹² *Shinkomal v. Manager Encumbered Estates*, 25 IC 789.

¹³ *Reddayay v. Banham*, 1896 AC 199.

¹⁴ *Chesterfield v. Janssen*, 1 Wh. & TLC 9 Ed. 248, 266: 26 ER 191.

injure or to cheat.¹⁵ When it is proved that the statement is false it must be further shown that the plaintiff has acted upon it and has sustained damage by so doing, that the statement was either the sole or the material cause of the plaintiff's act.¹⁶ If facts proved establish fraud the question of fraudulent intention or motive is immaterial.¹⁷ In an action for fraud not only should fraud be established but it should further be established that this fraud was the inducing cause of the contract,¹⁸ for misrepresentations which do not deceive do not amount to fraud.¹⁹ The plaintiff must prove that the contract was induced by fraud and that the plaintiff was damnified.²⁰ "Fraud without damage, or damage without fraud, gives no cause of action, but when these two concur an action lies".¹

A misrepresentation of a material part will affect the whole agreement, "for where a party has been induced to act on the faith of several representations made to him, anyone of which he has made fraudulently, he cannot set up the transaction by showing that every other representation was truly and honestly made".² A half-truth is no better than a falsehood.³ The following are the ingredients of fraud as contemplated by sub-sec. (1): (a) There should be a suggestion as to a fact. (b) The fact suggested should not be true. (c) The suggestion should have been made by a person who does not believe it to be true. (d) The suggestion should be found to have been made with intent either to deceive or to induce the other party to enter into the contract in question.⁴

2. Sub-section (1).—If A makes a statement to B which A knows to be untrue and does so with a view to induce B to enter into a transaction, there is sufficient basis for an action of deceit provided B relied upon that statement. If, however, it can be shown that A did not appreciate that it was not the truth, this will be consistent with honesty and will ground no charge of fraud.⁵ The foundation of fraud under sec. 17 is that a person making any representation

15 *United Motor Finance Co. v. Addison*, AIR 1939 PC 21; *R. C. Thakkar v. Gujrat Housing Board*, AIR 1973 Guj. 34, 52, 53.

16 *Edgington v. Fitzmaurice*, 29 Ch. D. (481-2): (1881-85) All ER Rep 856; see *Arkwright v. Newbold*, 17 Ch. D 301; see *Derry v. Peek*, 14 AC 337, 374: (1886-90) All ER Rep 1; *Thom v. Bigald*, 22 LJ Ex 243; *Smith v. Chadwick*, 9 AC 187; *Hansraj v. DET Co.*, 1940 PC 98.

17 *Ship v. Crosskill*, LR 10 Eq. 73; *Smith v. Chadwick*, LR 9 AC 187, 201: (1881-85) All ER Rep 1.

18 *Smith v. Chadwick*, (1881-85) All ER Rep 242: 9 AC 187; *Hansraj v. DET Co.*, 1940 PC 98.

19 *Clapham v. Shillito*, 7 Beav. 146; *Attwood v. Small*, 6 Cl. & F. 233, 238, 351; *Arwright v. Newbold*, 17 Ch. D 324.

20 *Bentinck v. Fenn*, 12 AC 652.

1 *Pasley v. Freeman*, Sm. LC cited in *Smith v. Chadwick*, 9 AC 187, 195; (1881-85) All ER Rep 242.

2 *Reynell v. Spyre*, 21 LJ Ch 633, 660: 21 LJ Ch 633: 42 ER 710; see *Arnison v. Smith*, 41 Ch D 348, 369; *Arkwright Newbold*, 17 Ch D 301.

3 *Gluckstein v. Barnes*, 1900 AC 240, 250-1.

4 *R. C. Thakkar v. Gujarat Housing Board*, AIR 1973 Guj 34, 44.

5 *United M. Finance Co. v. Addison & Co.*, 41 CWN 482.

which he intends another to act upon, must be taken to warrant his belief in its truth. He must be presumed to be aware of the fact that the person to whom it is made will at least understand that he, the representer, believes it to be true. Therefore if the representer does not in fact entertain any such belief in the truth of his representation, he is as much guilty of fraud as if he had made any other representation which he knew to be false or did not believe to be true.⁶ Thus, where a vendor sold property describing it as an interest in a partnership which he knew to be worth nothing, and the purchaser bought under the impression that it might be worth something, though there was no intentional fraud, yet there was fraud in the vendor upon taking the money, so the sale was set aside and the purchase money ordered to be refunded.⁷ Where by false representations of the directors of a company a person is induced to buy shares he is not liable as a contributory, but if such representations are made by a third person the purchaser is liable.⁸ A person recommending an agent by a statement known to him to be false has been held liable for the misconduct of the agent.⁹ Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is considered as having been obtained fraudulently.¹⁰ In contracts of insurance whether it is fire, life or marine, the utmost good faith is required.¹¹ The fraud of the agent who makes the contract is the fraud of the principal. But where one person insures the life of another, the party whose life is insured is not the agent of the party insuring, the latter therefore is not affected by the false statement of the former.¹² In cases of insurance the utmost good faith is required to be shown by the assured. Ordinarily, contracts of guarantee are not amongst those requiring the utmost good faith on the part of the creditor towards the surety.¹³ The withholding of material information will avoid a contract.¹⁴ Answers wilfully untrue are of the nature of fraud, the insured and his representatives acquire no rights under the insurance.¹⁵ It is only a misstatement of facts, as distinguished from an erroneous statement of law, that will entitle a party to avoid a contract on the ground of fraud.¹⁶ When a statement of fraud involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. There is hardly any fact that does not more or less involve a question of law.¹⁷

6 *R. C. Thakkar v. Gujrat Housing Board*, AIR 1973 Guj. 34, 54.

7 *Smith v. Harrison*, 26 LJ Ch. 412; see *Ellard v. Llandaff*, 1 Ball & Be 241.

8 *Duranty's Case*, 26 Beav. 268.

9 *Foster v. Charles*, 6 Bing. 396; *Attwood v. Small*, 6 Cl. & F 233; *Burnes v. Pennell*, 2 HLC 497; *Re Overend*, LR 3 Eq. 576.

10 *Pertap v. Mahendra*, 17 C 291, 297, misrepresentation on a point of law; *Kasinath v. Brindaban*, 10 C 649; *Nadia v. Birendra*, 20 CWN 1067.

11 *London Assurance v. Mansel*, 11 Ch. D 363, 367: 48 LJ Ch. 331.

12 *Wheelton v. Hardisty*, 8 E & B 232.

13 *Seaton v. Burnand*, (1899) 1 QB 782.

14 *Shiv v. N. B. M. Insce.*, 184 IC 575.

15 *W. I. L. Insce. v. Asima*, 1942 C 412.

16 *Horse v. Parel Life Assurance*, (1904) 1 KB 558: (1904-07) All ER Rep 630.

17 *Eaglesfield v. Londonderry*, 4 Ch. D 692, 702.

Fraud depends upon the state of a person's mind, and fraudulent intention cannot be imputed by reason of a presumption of law unless the person has knowledge in fact.¹⁸

The well-settled law in the field of insurance is that contracts of insurance including the contracts of life assurance are contracts *uberrima fides* and every fact of materiality must be disclosed; otherwise there is good ground for rescission. And this duty to disclose continues up to the conclusion of the contract and covers any material alteration in the character of the risk which may take place between proposal and acceptance. Where parties agreed that the vehicle could carry only five tons or the licensing carrying capacity of the vehicle whichever is less, the insurer cannot repudiate the contract on the ground that the proposal form gave the licensed carrying capacity of the vehicle as 5 tons while actually the licensed carrying capacity was 5.392 tons.¹⁹

Representation of opinion, or "vague laudatory flourish", does not affect a contract.²⁰

3. Sub-section (2).—When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper enquiry,¹ or that he had made a cursory and incomplete inquiry into the facts. If there has been a material misrepresentation calculated to induce him to enter into the contract, in order to take away his title to be relieved from it on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation or that he did not rely on the representation.² Concealment does not vitiate a contract when the information concealed comes after the completion of the contract.³ Where a seller being conscious of a defect in a wall plastered it up and papered it over, as the vendor had expressly concealed the defect, the purchaser might recover.⁴ A contract has been allowed to be rescinded because of the non-performance of a stipulation contained in it though the other party knew it to be impossible of performance.⁵ Where A obtained from B a lease of premises by means of a false representation, namely, that he intended to carry on a certain lawful trade therein, but converted it into a brothel, the misrepresentation, though fraudulent, was not sufficient to avoid the lease.⁶ A vendor or his agent who suppresses an encumbrance or defect in the title, of which he is aware, and which is con-

18 *Sarda v. Binay*, 58 C 224.

19 *S. Subramaniam v. H. G. I. Soc.*, AIR 1972 Mad. 196.

20 See cases rfd. to in argument in *Smith v. Land &c. Corpn.*, 28 Ch. D 7, 11, 15, statement of opinion may involve the statement of a fact. For discussion of the law of misrepresentation, see *Higgins v. Samels*, 2 J. & H. 460.

1 *Director &c. v. Kisch*, LR 2 HL 99, 120.

2 *Redgrave v. Hurd*, 20 Ch. D 1, 21: (1881-85) All ER Rep 77.

3 *Lishman v. Northern Insurance*, LR 10 CP 179.

4 *Pickering v. Dowson*, 4 Taunt 779, 785: (1803-18) All ER Rep 491.

5 *Cato v. Thompson*, 9 QBD 616.

6 *Feret v. Hill*, 15 CB 207: (1843-80) All ER Rep 924.

concealed from the purchaser, is guilty of fraud.⁷ Fraud is committed when a person buys goods without the intention of paying for them.⁸ Where a manufacturer buys goods to a reasonable amount for the purpose of his manufacture, it cannot be said that because he is insolvent at the time he must have bought them without any reasonable expectation of being able to pay for them.⁹ But the action of a person who orders goods with the deliberate intention of not paying for them amounts to fraud,¹⁰ and no title passes to the person in the goods.¹¹ When the original contract is void on account of fraud the vendees must still be considered as the agents of the vendor, and their possession as that of the vendor, as long as the price is not paid.¹² So also where money is borrowed but not applied for the purpose alleged in the prospectus it is fraud.¹³ Mere failure to fulfil a promise is not fraud unless from the outset the promisor intended not to fulfil it.¹⁴

If the maker of a chattel sells an article with a patent defect and the buyer buys it without inspecting it, the seller is not guilty of fraud.¹⁵ Merely allowing the vendee to purchase while labouring under a delusion with regard to the article purchased, in the absence of a warranty, does not affect the contract.¹⁶ Mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into the contract; there must be something actively done to deceive him and draw him in to deal with the person withholding the truth from him.¹⁷ There is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor.¹⁸ A sale without disclosing the price paid for the thing sold is good as the vendor is not bound to disclose the fact,¹⁹ but a misrepresentation as to the price given amounts to fraud and the contract may be rescinded, but "mere inadequacy of value would have been no ground for rescinding the purchase".²⁰ Where a person submitted a proposal for insurance, but before its acceptance there was a material change in the state of his health which he failed to inform to the insurers, the contract became voidable.¹ So also where a person agrees to take shares believing certain persons to be directors of a company; if before the shares are allotted to him

7 *Gajapathi v. Alagia*, 9 M 89; *Haji Essa v. Doyabhai*, 20 B 522, 529.

8 *Clough v. L. & N. W. Ry. Co.*, LR 7 Ex. 26: (1861-73) All ER Rep 646, Ex. p. *Whit-taker*, LR 10 Ch. 446.

9 *Re Ainsworth*, LR 3 Ch. 244.

10 *Dursun v. Indur*, 6 WR 81 reffd. to.

11 *Load v. Green*, 15 M & W 216.

12 *Allahabad Bank v. Madan*, 39 IC 169.

13 *Edgington v. Fitzmanrice*, 29 Ch. D 459, 483: (1881-85) All ER Rep 856.

14 *Maung Shwe v. Chet*, 42 IC 113.

15 *Horsfall v. Thomas*, 31 LJ Ex. 322 commented in *Smith v. Hughes*, LR 6 QB 597; see *Carlisch v. Salt*, (1906) 1 Ch. 335.

16 *Ksates v. Cadogan*, 20 LJCP 76.

17 *Peck v. Gurney*, LR 6 HL 377, 391.

18 *Smith v. Hughes*, LR 6 QB 597: (1861-73) All ER Rep 682.

19 *Re Coal Gas Co.*, 1 Ch. D 182.

20 *Lindsay Petroleum Co. v. Hurd*, LR 5 PC 221, 242, 243.

1 *Locker v. Law Insurance Co.*, (1923) 1 KB 554.

one of the directors retires, the agreement may be repudiated.² A misrepresentation untrue at the time when made, if it becomes true when acted upon, does not amount to misrepresentation.³

The Contract Act does not apply to a marriage under the Hindu Marriage Act, 1955. Sec. 12(1) (c) of the latter Act does not speak of fraud in any general way. Mere non-disclosure prior to marriage of curable epilepsy of the bride and a false representation that she is healthy does not amount to fraud within the meaning of sec. 12(1) (c) of the Hindu Marriage Act, 1955.⁴

4. Sub-sec. (4).—It is not essential, to constitute fraud, that there should be any misleading by express words; it is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant to enter into the contract by leading him to believe that which the plaintiffs knew to be false, the plaintiffs knowing that, if he had not been thus misled, he would not have entered into the contract.⁵ Secrecy and haste do not, by themselves, constitute fraud.⁶

5. Sub-sec. (5).—It is the duty of a person, who receives information or warning that his premises will be set on fire, in consequence of which he insures the premises, to disclose to the insurer the information so received. If he fails to do so the insurer is discharged from liability. Every circumstance which would influence or be likely to influence the judgment of a prudent insurer in fixing the premium and in determining whether he will take the risk or not should be disclosed.⁷ Similarly, the utmost candour and honesty ought to characterise the published statements in a prospectus. Any fraudulent misrepresentation or wilful concealment contained in it, by which a person has been induced to enter into a contract, will enable him to have the contract rescinded if he be guilty of no needless delay.⁸ But a contract cannot be rescinded on the ground that the statements in the prospectus are coloured or exaggerated, provided there is no material misstatement of fact.⁹

With regard to contracts for the sale of land if there be a defect which is exclusively within the knowledge of the vendor, which the purchaser would not be expected to discover for himself with ordinary care, the contract may be rescinded or specific performance resisted.¹⁰ Where a seller knows of a defect in the title to a part of the estate, which is material to the enjoyment of the rest and does not disclose the fact to the purchaser, the sale may be avoided by the purchaser,¹¹ but not if the vendor can make good the defect.¹²

2 *Re Scottish Petroleum Co.*, 23 Ch. D 413; *Karberg's Case*, (1892) 3 Ch. 1.

3 *Ship v. Crosskill*, LR 10 Eq. 73; *Goddard v. Jeffreys*, 51 LJ Ch. 57.

4 *Raghunath v. Vijay*, AIR 1972 Bom. 132, 136-139.

5 *Lee v. Jones*, 17 CBNS 482, 507.

6 *Ram v. Jagannath*, 1932 A 5.

7 *Imperial Pressing Co. v. British Assurance*, 41 C 581; *Abrahams v. Dunlop Tyre Co.*, (1905) 1 KB 46 *referred to*.

8 *Directors & Co. of the Central Ry. v. Kisch*, LR 2 HL 99; see *Ross v. Estate Investment Co.*, LR 3 Eq. 122, 136.

9 *Benton v. Macneil*, LR 2 Eq. 352.

10 *Carlsh v. Salt*, (1906) 4 Ch 335; *Beyfus v. Lodge*, (1925) 1 Ch 350; (1925) All ER Rep 552.

11 *Mostyn v. West Mostyn Coal Co.*, 1 CPD 145.

A vendor who means to exclude the purchaser from his right to have a good title shown must do so by explicit and clear words. If the vendor seeks to exclude the purchaser by a statement of fact, he must prove the fact to be true. A condition of sale is bad as misleading, (1) if it requires the purchaser to assume what the vendor knows to be false; (2) if it mentions that the state of the title is not accurately known, when in fact it is known to the vendor.¹² But a party who relies on the representation of the vendor that he has a good title and refrains from making any investigation is not absolved from liability.¹⁴ In case of an unfurnished house there is ordinarily no warranty of fitness for occupation.¹⁵ The rule is different with respect to furnished houses or apartments. In such cases, the law implies, in the absence of an agreement to the contrary, a warranty by the landlord as to the fitness of the premises.¹⁶ In a contract with builders for the construction of a house there is an implied warranty of fitness of the house for dwelling purposes.¹⁷ Purchases of land have been avoided on the ground of misstatements in particulars or non-disclosure of important facts.¹⁸ The doctrine of constructive notice does not apply in such a case.¹⁹ The omission, by a person suing to recover the price of goods, to state in the plaint that the goods were with him, does not amount to any fraud or false averment; the vendor cannot on this ground have the decree set aside.²⁰

6. Explanation.—Mere concealment, apart from fraud, does not affect a contract. The mere fact that a governess described herself as a spinster and concealed the fact that she was married and divorced was held not to avoid the contract.¹ Non-disclosure of a particular fact may amount to an active concealment. If a party be induced by such deception to enter into a contract he may have it rescinded if he applies within a reasonable time of the discovery.² Mere non-disclosure of material facts, which a party is not bound to disclose, however morally censurable, however, that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would be no ground for an action in the nature of a misrepresentation. There must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.

¹² *Re Morrell & Chapman's Contract*, (1915) 1 Ch. 162, 532.

¹³ *Re Banister*, 12 Ch. D 181.

¹⁴ *Hume v. Pocock*, LRI Ch. 379 see *Attwood v. Small*, 6 Cl. & F 232, 338, 351; *Jennings v. Broughton*, 23 LJ Ch. 999.

¹⁵ *Keates v. Cadogan*, 10 CB 591.

¹⁶ *Collins v. Hopkins*, (1928) 2 KB 617; (1928) All ER Rep 225.

¹⁷ *Moorecock*, 14 PD 64, *Lawrence v. Cassel*, (1930) 2 KB 83; (1930) All ER Rep 738, reld. to in *Miller v. Cannon Hill Estates*, (1931) 2 KB 113; (1931) All ER Rep 93.

¹⁸ *Re Arnold*, 14 Ch. D 270; *Jones v. Rimmer*, 14 Ch. D. 588.

¹⁹ *Fleelman v. Corbett*, (1930) 1 Ch. 672, 682.

²⁰ *Muhammad v. Gulam*, 156 IC 156.

¹ *Fletcher v. Krell*, 42 LJQB 55.

² *Gordon v. Street*, (1899) 2 QB 641; *Carter v. Boehm*, 3 Burr 1905, 1910: (1558-1774) All ER Rep 183.

Every man must be held responsible for the consequences of a false representation made by him to another upon which that other acts and, so acting, is injured or damnified.³ Directors of a company may purchase shares from shareholders without disclosing pending negotiations for the sale of the company's undertaking.⁴ Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there is a duty to disclose to show that the duty existed. That duty exists in many cases. Thus the pre-existing relationship of principal and agent, of solicitor and client, *etc.*, involves the duty of disclosure; so also in case of contracts *uberrimae fidei*, or, again where in the course of negotiations a material term of the contract has been discovered to be false.⁵ Non-disclosure of material facts rendering the original policy of insurance void would automatically render void the re-insurance policy also.⁶ Mere failure by a minor to reveal his age, when he makes no false representation, and no enquiry is made as to his age, cannot be regarded as a fraud.⁷ Yet, as observed in *Arkwright v. Newbold*,⁸ "if one said something it may create an obligation to say something more". A duty to speak arises wherever, and only where, silence can be construed as having an active property, that of misleading.⁹ Where a representation is made in the course of negotiations, but the circumstances are afterwards altered to the knowledge of the person making the representation, it is his duty to inform the other party of the alteration in circumstances, of which he is ignorant. A representation is not like a warranty; it is not necessary that it should be strictly complied with; it is enough if it is substantially true.¹⁰ Men in their dealings with each other should exercise proper vigilance and not close their eyes to the means of information which are accessible to them. Where two parties are at arm's length, either of them may *prima facie* remain silent.¹¹ When an old woman of 89 sold property for 1/10th of its value, because she was in distress, and had no legal assistance and believed that she could not make out a good title, but the purchaser knew that she could and concealed the fact from her, this silence of the purchaser was a *suppressio veri* which was one of the elements which constituted a fraud.¹² There being no fiduciary relation between the vendor and the purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the

³ *Peck v. Gurney*, LR 6 HL 377, 403, 413: (1861-73) All ER Rep 116; see *Fletcher v. Krell*, 42 LJQB 55; *Carlisch v. Salt*, (1906) 1 Ch. 335; *Davies v. London & Insurance Co.* 8 Ch. D 469, 474-5.

⁴ *Percival v. Wright* (1902) 2 Ch. 421.

⁵ *Davies v. L. & P. Insce. Co.*, 8 Ch. D. 469.

⁶ *Vanguard Investments Ltd. v. SMG Insc. Socy.*, AIR 1973 Mad. 147.

⁷ *Sher v. Akhtar*, 168 IC 730.

⁸ 17 Ch. D 301, 310.

⁹ *Joy v. Sreenath*, 32 C 357; *Jakhormull v. Saroda*, 7 CLJ 604; *Harendra v. Purna*, 15 CLJ 132.

¹⁰ *With v. O' Flannagan*, 1936 Ch. 575.

¹¹ *Reilly v. Rajkumari*, 36 CLJ 245.

¹² *Summers v. Griffiths*, 35 Beav. 27.

subject matter of sale. But gesture intended to induce the vendor to believe in the existence of a non-existing fact would be sufficient for a court of equity to refuse a decree for specific performance of the agreement.¹³ A purchaser, generally speaking, is under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence unless he undertakes or professes to communicate them. This however he may be held to do if he makes some other communication which without the addition of those facts would be necessarily or naturally or probably misleading.¹⁴ In order to support a case of acquiescence there must be something more than mere silence or inaction. In the case of estoppel the material representations are active in form while in the case of acquiescence the representations are to be inferred from silence.¹⁵

Non-disclosure of material facts which come to the knowledge of a party during the subsistence of a contract may have the effect of rescinding it.¹⁶ As has been said in *Joy v. Srinath*,¹⁷ "it cannot be doubted that there may be cases in which there may be deception by omission, but silence may be treated as deception only when there is a duty to speak". Mere silence, mere inaction, cannot be construed to be a representation. In order to support a case of acquiescence there must be something more than mere silence or inaction. It is fraud when a man, in order to mislead the other side and induce him to enter into a contract (1) makes a false statement knowingly, or (2) makes a statement believing it to be true, but afterwards comes to find out that it is untrue and still keeps silent, or (3) does not speak when there is a duty to speak in order to induce the other party to believe that he had nothing to say.¹⁸ If it be the practice at an auction to indicate in any particular manner goods which are damaged or repacked, a failure to indicate the same in a particular instance is equivalent to a sale of goods without those defects, therefore an action for fraud will lie.¹⁹

18. "Misrepresentation" defined. — "Misrepresentation" means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any

¹³ *Walters v. Morgan*, 3 DGFJ 718.

¹⁴ *Subramanian v. Official Assignee*, 133 IC 372; *Cooks v. Boswell*, 11 AC 232.

¹⁵ *Abdul v. Upendra*, 40 CWN 1370, as to elements of acquiescence, see *Wilmott v. Barber*, 15 Ch D 96.

¹⁶ *Phillips v. Foxall* LR 7 QB 666.

¹⁷ 32 C 357, cited in *Abdul v. Upendra*, 40 CWN 1370.

¹⁸ *Brownlie v. Campbell*, 5 AC 925, 950; *Arnison v. Smith*, 41 Ch D 348, 368.

¹⁹ *Jones v. Bowden*, 4 Taunt 847.

one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;

- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

1. Section.—The section defines misrepresentation.

“The principal distinction between fraud and misrepresentation is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the other party.²⁰

2. Sub-section (1).—Where a person makes a positive assertion relying upon the statement of another that a certain third party would become a director, he is not warranted in making that assertion.¹ A representation may be untruthful by reason of the suppression and concealment of truth, not untruthful in the sense of direct falsehood, but untruthful because it is intended to convey to the public an impression different from the reality, because it is known by the person who conveys it, or ought to be known by him, to be materially different from that which was the real state of the case.² An endorsement acknowledging full satisfaction of a mortgage, when it has not been so satisfied, is misrepresentation.³

3. Sub-section (2).—The sub-section is probably intended to meet all those cases of “constructive fraud” where the circumstances are such as to make the party who derives a benefit from the transaction equally answerable in effect as if he had been actuated by motives of fraud.⁴ Where the defendant asked for rooms in a hotel in the same block as the dining room and was furnished by the plaintiff with a plan of a cottage which was stated to be in the main building, there was no misrepresentation, as the defendant had the means of discovering the truth with ordinary diligence and it was not known to the plaintiff that the defendant attached importance to proximity to the main building.⁵ When a representation in a matter of business is made by one man to another calculated to induce him to adapt his conduct to it, it is perfectly immaterial whether the representation is made knowing it to be untrue, or whether it is made believing it to be true, if, in fact, it was untrue.⁶ Falsehood vitiates a transaction; it is no defence to say that the same thing might

²⁰ *Niaz v. Parsottam*, 29 ALJ 153.

¹ *Mohun v. Sri Gungaji Cotton Mills*, 4 CWN 369.

² *Emma Silver Mining Co. v. Grant*, 11 Ch D 918.

³ *Bangappa v. Imam*, 1934 N 29.

⁴ *Oriental Bank v. Fleming*, 3 B 242.

⁵ *Donca v. Teed*, 36 IC 34; but see *Allah v. Barrow*, 38 IC 500.

⁶ *Leather v. Simpson*, LR 11 Eq. 398, 406.

⁷ *Williams' Case*, LR 9 Eq. 225.

have resulted if the truth had been known.⁷ The injury must be the immediate and not the remote consequence of the representation.⁸

4. Sub-section (3).—A mere general statement by an auctioneer that the land is fertile and improvable, whereas part of it had been abandoned as useless, cannot be regarded as a misrepresentation which will entitle a purchaser to be discharged, but is a mere flourishing description by the auctioneer.⁹ A party is entitled to rescind a contract to which he is induced to enter by fraudulent representation regarding the thing bargained for. But where there has been an innocent misrepresentation or misapprehension it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.¹⁰

Where the vendor put forward a statement as to liquor shops which was misleading and the purchasers made a mistake as to the substance of the thing they were contracting for, the Court proceeded on the basis that there was misrepresentation. An omission to state a material fact is misrepresentation and not fraud.¹¹ Where there was a positive assertion that a vessel was not more than 2,800 tonnage, an assertion not warranted by any information the plaintiff had at the time and which was untrue, but which induced the other party to enter into the contract, the other party was entitled to avoid the contract by reason of the plaintiff's misrepresentation of the size of the vessel.¹² Where directors, acting within their authority, sold on behalf of a company a bill, upon which the company was not however liable, they were guilty of misrepresentation, as no ordinary diligence would have enabled the purchaser to discover that the company was not liable.¹³

19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the

⁸ *Barry v. Crosky*, 2 J & H 1, 28; *Flight v. Booth*, 1 Bing NC 370, 377: (1824-24) All ER Rep 43; *Shepherd v. Croft*, (1910) 1 Ch 521.

⁹ *Dimmock v. Hallett*, LR 2 Ch 21.

¹⁰ *Seddon v. N. F. Salt Co.*, (1905) 1 Ch 326; (1904-07) All ER Rep 817; *Kennedy v. Panama Mail*, LR 2 QB 580, 587; 86 LJ QB 260; but see *Lever Bros. v. Bell*, (1931) 1 KB 557; (1931) All ER Rep 1.

¹¹ *Sorabekall v. Secretary of State*, 29 Bom. LR 1535, *1539.

¹² *Oceanic S. N. Co. v. Soenderdass*, 14 B 241.

¹³ *Re Nursey S. & W. Co.*, 5 B 92.

contract, nevertheless, is not voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B. B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

1. **The Section.**—The words 'undue influence' were repealed by Act VI of 1899, S. 3. No court will allow itself to be used as an instrument of fraud, though help under certain circumstances may be obtained.¹⁴ The section deals with the effects of coercion, fraud and misrepresentation on a contract. There are two remedies available to a party under the section, (1) avoidance or rescission and (2) completion and the enforcement of the representation.¹⁵ Under this section the rights given to a party who has entered into a contract under fraud or misrepresentation are to avoid the contract or to insist on the contract being performed. The section does not entitle the party to insist on an entirely different contract being performed. Moreover, the rights given by the section are given only to a party whose consent to the contract was, in fact, caused by the fraud or misrepresentation.¹⁶ After rescission such a contract will not be enforceable at all. Some amount of puffing must be allowed in a prospectus. A statement that something will be done is not a statement of an existing fact, so

¹⁴ *Gudappa v. Balaji*, 1941 B 275 FB.

¹⁵ *Sorabshah v. Secretary of State*, 29 Bom. LR 1535; *Reese R. S. Mining Co. v. Smith*, 39 LJ Ch 849; LR 4 HL 64; 17 WR 1024; *Boines v. Bask*, 1940 L 505.

¹⁶ *Mahmad v. Ramappa*, 119, IC 684.

it does not amount to misrepresentation. Where fraud has actually succeeded, a plaintiff will not be allowed to go back upon the terms of a contract on the ground that he had thereby fraudulently attempted to cheat a third person. The plaintiff will be estopped from alleging his own fraud and setting it up as against the defendant. The case of a defendant pleading that there has been a fraud, to which the plaintiff was a party, is wholly different.¹⁷ Apart from fraud, undue influence, *etc.*, the court has no jurisdiction to interfere with a valid contract which was fair at the relevant time, namely, when it was made.¹⁸ The section has no application when the contract itself provides a clause of defeasance.¹⁹ For analogous law, see S. 55(1), Transfer of Property Act.

2. Effect of coercion, *etc.*, on contract.—A contract made under pressure is voidable. But if instead of attempting to repudiate the transaction by not acting up to it or by other means, the party indicates a complete acquiescence in the arrangement that has been made subsequent thereto, he is bound by it and the contract cannot be avoided for want of consent.²⁰ An acknowledgement of liability to pay is not binding when it has been caused by intimidation.¹ Where plaintiff on being wrongfully arrested pays a sum of money under duress to obtain his discharge, he is entitled to recover it from the sheriff.² A compromise of a case brought about by a form of judicial coercion cannot stand as the consent cannot be deemed to be fair and free.³ As to the effect of coercion on marriage, see *Ram Harakh v. Jagarnath*.⁴

A contract induced by fraud is not void, but only voidable at the option of the party defrauded; secondly, the contract is valid till rescinded; and thirdly, the option to avoid a contract is barred where innocent third parties have, in reliance on the contract, acquired rights which would be defeated by its rescission.⁵ Where at an auction sale a third person dishonestly and with interested motives, but without any privity with the seller, made bids so that the purchaser had to pay more than he otherwise would have to pay, the contract was avoided by fraud.⁶ A compromise by which a party undertakes not to file an appeal is void or voidable if the party had no right to appeal.⁷ Where there is no agreement to make compensation in case of misdescription, the purchaser is entitled to compensation, in case of deficiency of area, if he can make out a fraudulent misrepresentation which he accepted as true.⁸ Where there is an

17 *Mohammad v. Jang*, 156 IC 362.

18 *Tekchand v. Birzabai*, 1942 N 119.

19 *W. I. L. Ince v. Asima*, 1942 C 412.

20 *Seetharama v. Bayanna*, 17 M 275.

1 *Bisram v. Kewal*, 59 IC 781.

2 *Mesnil v. Dakin*, LR 3 QB 18.

3 *Mousell v. Ghanshyam*, 39 CWN 61 refing to *Radha v. Luchmichand*, 24 CWN 454.

4 1932 A 5.

5 *Tenment v. Glasgow Bank*, 4 AC 615; *Oakes v. Turquand*, LR 2 HL 325: (1861-78) All ER Rep 738; *Stevenson v. Newnham*, 22 LJCP 110.

6 *Union Bank v. Munster*, 37 Ch D 51.

7 *Ram v. Municipal Committee*, 1939 L 511.

8 *Abdullah v. Abdur*, 18 A 322.

agreement to make it, a purchaser loses the right to claim the compensation if, with due diligence, he might have knowledge of the defect, or, if after coming to know of it he took possession without insisting on the payment of compensation. He does not lose this right simply because conveyance has been executed.⁹ It is well established that where the contemplated fraud has not been effected, a party to a fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. The rule applies even where a party suffers a decree to be passed against him in a collusive suit which is only part of the fraudulent scheme.¹⁰ If a person seeks on the ground of fraud to cancel or set aside a contract, he must set aside the contract as a whole, and not a part thereof. The person who impeaches a contract must make up his mind to take it as it stands or repudiate it *in toto*. It is not open to him to accept it in part and reject the other part.¹¹ unless the parts are so severable as to form two independent contracts.¹² Where a sale of property is vitiated by fraud on the part of the vendor, the buyer of the property at a Court auction sale, though only a benamidar, can maintain an action to complete the sale.¹³ An agreement between two parties, if fair on general principles, is not invalid merely because it may have been brought about by a third party with a fraudulent intention of benefiting himself.¹⁴

It appears that this section read with S. 14 deals with fraud so far as it affects the free will of the parties at the time of entering into a contract; the Explanation must be taken as meaning that any subsequent fraud will not affect the validity of the original contract.¹⁵ In other words, fraud in the performance of a contract, apart from its making, is no ground for rescission and restoration of the parties to the position in which they were before the contract was entered into.¹⁶ A *bona fide* purchaser for valuable consideration, without notice of fraud, from a fraudulent possessor gets a good title to property which his seller has obtained by fraud; in such a case the goods cannot be recovered from the purchaser.¹⁷ Where the court is of opinion that the plaintiff and the defendant were acting together with a view to perpetrate a fraud, and that there was no difference in the degree of guilt of the parties, the court will assist neither party.¹⁸ The proposition that a deed cannot be avoided by a party to the fraud has been doubted.¹⁹

Whether the representation made in a particular case actually induced the other party to enter into the contract or not is a question of fact and not of

⁹ *Re Turner*, 13, Ch D 131.

¹⁰ *Rajab v. Hadayet*, 19 CWN 1151, see conflicting rulings discussed.

¹¹ *Ohid v. Dorsha*, 95 IC 144.

¹² *United Shoe M. Co. v. Brunet*, 1909 AC 330, 340.

¹³ *Raja Venkata v. Goluguri*, 34 M 143, headnote.

¹⁴ *Bellamy v. Sabins*, 2 Phillips 425, 438.

¹⁵ *Chitturi v. Boddu*, 28 IC 57.

¹⁶ *Jamsetji v. Hirjibhai*, 37 B 158.

¹⁷ *Fazal v. Mangaldas*, 46 B 489; *Hollins v. Fowler*, LR 7 HL 757; (1874-80) All ER Rep 118; *Stevenson v. Newnham*, 22 LJCP 110; but see *Helby v. Matthews*, 1895 AC 471; (1895-99) All ER Rep 821.

¹⁸ *Nawab v. Daljit*, 155 IC 928; *Ramlal v. Rajendra*, 1933 O 124.

¹⁹ *Vilayat v. Miron*, 45 A 396; see *Kamayya v. Mamayya*, 32 MLJ 484.

law.²⁰ Incorrect statement of a matter of law is not such misrepresentation as will entitle the other party to whom it is made to obtain relief.¹ But a misrepresentation on a point of law, if wilfully made, will disentitle a party to any benefit he has got by such misrepresentation.² A representation on a matter of private right, however, is a representation of fact.³ A collateral promise to do some act, though it may effectively induce the promisee to enter into a contract, is not, properly speaking, a representation at all.⁴ A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of the court to have the untrue representation made good.⁵ A widow was held not bound by a bond executed by her as it was obtained from her by misrepresentation, *viz.*, that a debt was due from her husband.⁶ A man who is deceived by his prospective wife on the subject of her chastity is not entitled to obtain a divorce or decree of nullity on the ground of deceit practised or false representation made before marriage.⁷ Where the defendant intimated that he wanted a house with 4 bedrooms and the plaintiff sent a plan showing 4 bedrooms, but one was not fit to be used as a bedroom, the defendant was entitled to rescind the contract. As personal inspection of the house was not possible, the Exception did not apply. A party to a contract is entitled to repudiate the contract when the fact of misrepresentation comes to his knowledge.⁸ A person paying insurance premiums by relying on the misrepresentation of the defendant, which renders the contract voidable, is entitled to recover the premiums as money had and received to his use.⁹ In English law a person is not liable in damages for an innocent misrepresentation, no matter in what way and under what form the attack is made. In *Derry v. Peek*,¹⁰ it was definitely laid down that in order to establish a cause of action sounding in damages for misrepresentation, the statement must be fraudulent, or must be made recklessly, not caring whether it was true or false. Where at a sale by the Registrar it was represented in the abstract that the entire 16 annas share in a house was being sold, whereas the purchaser found that only $\frac{1}{4}$ ths share in the premises was sold to him, the contract could not be

20 *Smith v. Chadwick*, 9 AC 187: (1881-85) All ER Rep 242; 195-6; see *Re Turner*, 13 Ch D 131 fold in *Palmer v. Johnson*, 13 QBD 351: (1881-85) All ER Rep 719; *Bos v. Helsham*, LR 2 Ex. 72; *Cann v. Cann*, 3 Sim. 447.

1 *Rashdall v. Ford*, LR 2 Eq. 750.

2 *West London Commercial Bank v. Kitson*, 13 QBD 360: 53 LJ QB 345; *Hirschfeld v. L&BSC Ry.*, 2 QB D 1, 5-6 (1874-80) All ER Rep 1191.

3 *Archer v. Stone*, 78 LT 35.

4 *Hiralal v. Jagatpati*, 111 IC 797, 804.

5 *Hammersley v. De Biel*, 12 Cl & F 45, 62: 8 ER 1812 HL; See *Smith v. Hughes*, LR 6 QB 597, 607: (1861-73) All ER Rep 632.

Medilal v. Ram, 152 IC 466.

Holt v. Holt, 53 Sol. Jo. 84; *Green v. Green*, 21 LT 401; *Dawson v. Dawson*, 98 JP 187.

Allah v. Barrow, 38 IC 500.

9 *Kettlewell v. Refuge Assurance Co.*, (1907) 2 KB 242 affd 1909 AC 243.

10 14 AC 337, but see *Maekensis v. Royal Bank*, 32 ALJ 763 PC.

enforced against the purchaser on account of misrepresentation.¹¹ A contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts although such misrepresentations may not have been fraudulent.¹² Material misdescription vitiates a policy of insurance. By material misdescription is meant a misdescription such as would affect the mind of a reasonable insurer either as to accepting the risk or as to the premium which he would place upon the risk. Whether a misdescription is material or not is partly a question of inference and partly a question of law.¹³ A contract of guarantee, like any other contract, is liable to be avoided if induced by misrepresentation of an existing fact, even if made innocently.¹⁴ A seller was held not liable for misdescription because of a provision in the written contract that there would be no allowance for 'any defect or error whatever'.¹⁵ A provision in a contract of insurance that a false statement would put an end to the contract avoids it, whether the statement is material or not.¹⁶

The plaintiff took a white satin dress to the defendants' shop to be cleaned. She was given a paper headed "Receipt" and was asked by a shop assistant to sign it. The plaintiff inquired why her signature was required and the assistant replied, in effect, that the defendants would not accept liability for certain specific risks, including the risk of damage by or to the beads and sequins with which the dress was trimmed. In fact the "receipt" contained a condition that the cleaners accepted no liability for any damage however arising. When the dress was returned to the plaintiff it was found to be stained, and she was awarded damages by the county court judge, who held that the defendants had been guilty of negligence and were not protected by their exemption clause by reason of misrepresentation as to its character. On appeal by the defendants, it was held that the defendants could not rely on the exemption clause because their assistant by an innocent misrepresentation had created a false impression in the mind of the plaintiff as to the extent of the exemption and thereby induced her to sign the receipt.¹⁷

3. Fraud etc. by persons not parties to contract.—Misrepresentation by an agent is misrepresentation by the principal.¹⁸ The general rule is that the master is answerable for every such fraud or wrong of the servant as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. Even if the master has not authorised the particular act, but he has put the agent in his place to do that class of acts, he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master

11 *Upendra v. Obhoy*, 5 CWN 593.

12 *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch 392, 422, 442.

13 *Dawson's Bank v. Vulcan Insee. Co.*, 60 CLJ 551 (case of fire insurance); *Lakshmi v. G. L. A. Society*, 1932 B 582.

14 *Mackenzie v. Royal Bank*, 151 IC 981.

15 *Taylor v. Bullen*, 20 LJ Ex. 21.

16 *Anderson v. Fitzgerald*, 4 HLC 484.

17 *Curtis v. Chemical cleaning & Dying Co.*, (1951) 1 KB 805.

18 *Dukharan v. C. C. Corpn.*, 1940 O 85.

to place him in.¹⁹ It has since been definitely ruled that the act need not be for the master's benefit.²⁰ Where the plaintiff paid a sum of money to the second defendant, the agent of the first, who misappropriated it and the first defendant sued the plaintiff and obtained a decree, the plaintiff was held not entitled to recover as there was no question of mistake, fraud, etc.¹ Where the false representation is made by one who is no party to the agreement, the contract cannot be avoided.² Innocent parties cannot derive benefits from the fraud of others.³

4. Election to avoid.—A contract continues to be valid till the party defrauded has determined his election by avoiding it.⁴ A contract tainted with fraud is not void but voidable. If there is fraudulent representation not merely as to the contents of a document but as to its character the document is void altogether.⁵ Lapse of time without rescinding a contract will furnish evidence of a determination to affirm the contract.⁶ Thus, even if a contract to take shares be voidable upon the ground of fraud or misrepresentation, if a person ratifies the contract, e.g., by applying to be appointed a director, by acting as director, by giving a report that the company is a profitable concern, he is liable as a contributory.⁷ A plaintiff who, knowing of the fraud, treats the transaction as a contract, loses his right of rescinding it and cannot recover back the money from the seller even though he afterwards discovers a new incident in the fraud.⁸ Where a contract, voidable at the election of a party, on account of fraud or undue influence, is avoided, if nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning.⁹ If a person elects to affirm a contract he may yet sue the person for compensation in damages who by fraud induced him to enter into it.¹⁰ The party entitled to elect may repudiate the contract and restore any benefit that he may have received under it or, if he has received none, he may defend any suit brought against him on the contract by the other party.¹¹

5. Delay.—As soon as a fraud is discovered the contract ought to be repudiated, so that the party repudiating may be in the same situation as if the contract had no existence at all, but if he continues to perform his part

19 *Barwick v. English Joint Stock Bank*, LR 2 Ex. 259: (1861-73) All ER Rep 194; *Citizen's Life Assce Co. v. Brown*, 1904 AC 423.

20 *Lloyd v. Grace*, 1912 AC 716: (1911-13) All ER Rep 51.

1 *Kulandaivelu v. Ramaswami*, 44 MLJ 495.

2 *Pulsford v. Richards*, 22 LJ Ch 559.

3 *Huguenin v. Baseley*, 14 Ves. 289: (1803-13) All ER Rep 1, refd. to in *Nicol's Case*, 3 DG & J 387, 438.

4 *Panchanan v. Nirode*, AIR 1962 Cal 12.

5 *Ningawwa v. Byrappa*, AIR 1968 SC 956.

6 *Clough v. L. & N. W. Ry.*, LR 7 Ex. 26: 41 LJ Ex. 17.

7 *Hakim v. Kharak*, 46 IC 21.

8 *Campbell v. Fleming*, 1 Ad. & E 40.

9 *Reg. v. Sadlers' Co.*, 10 HLC 404 cited in *Satgur v. Harnarain*, 34 Bom. LR 771.

10 *Armison v. Smith*, 41 Ch D 348, 371.

11 *Ranganath v. Govind*, 28 B 639.

of the contract he must be bound by its terms.¹² Where a person has contracted to take shares in a company and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation.¹³ Therefore, a person considering himself misled by fraud or misrepresentation should raise his objection at an early period without undue delay.¹⁴ It is too late after winding up has commenced to rescind a contract for shares on the ground of fraud. The right to rescind must be exercised within a reasonable time,¹⁵ for delay prevents a party from avoiding a contract.¹⁶ Concealed fraud postpones the running of time where there was no sufficient means of discovering it, laches or negligence cannot be attributed until the discovery of fraud. On the contrary, it has been said that lapse of time is no bar to the plaintiff,¹⁷ for the delay must be such as would bring the statute of limitation applicable to the case into operation.¹⁸ The equitable doctrine of laches and acquiescence does not apply to suits in the mofussil for which a period of limitation is provided by the Limitation Act.¹⁹ Delay is not material so long a matter remains in *status quo* and it does not mislead the defendant or amount to waiver or acquiescence. It must be shown that delay has prejudiced the defendant.²⁰

6. Means of discovering the truth.—The Exception to the section, it has been pointed out, does not depart from the well established rule of English law, though it is ambiguously worded. In the case of an active misrepresentation knowing the fact to be false, as distinguished from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence. The Exception cannot mean that fraud does not vitiate a contract unless the party defrauded had no means of discovering the truth. The difficulty, it has been suggested, has been caused by the punctuation, namely, a comma after the word 'silence', which seems to indicate that the words 'fraudulent within the meaning of section 17' apply both to misrepresentation and to silence. But these words refer to 'silence' exclusively, so if the comma after the word 'silence' be ignored, the result would be to bring the law in conformity with the English law.¹

12 *Selway v. Fogg*, 5 M & W 83: 81 LJ Ex. 199: 151 ER 36.

13 *Aaron's Reefs v. Twiss*, 1896 AC 273, 295: 65 LJ PC 54.

14 *Directors &c. v. Kisch*, LR 2 HL 99; *Sharpley v. Louth Ry.*, 2 Ch D 663: 46 LJ Ch 259.

15 *Oakes v. Turquand*, LR 2 HL 325: (1861-73) All ER Rep 738, cited in *Tennent v. Glasgow Bank*, 4 AC 615, 621.

16 *Clough v. L. & N. W. Ry.*, LR 7 Ex. 26: (1861-73) All ER Rep 646.

17 *Betjemann v. Betjemann*, (1895) 2 Ch 474; *Browne v. Mc. Clintock*, LR 6 HL 456; *Lindsay Petroleum Co. v. Hurd*, LR 5 PC 221, 240-1; *Erlanger v. N. S. Phosphate Co.*, 3 AC 1218: (1874-80) All ER Rep 271.

18 *Peck v. Gurney*, LR 6 HL 377, 402: (1861-73) All ER Rep 116; *Kanaka v. Mutta*, 18 M 445; *Lindsay Petroleum Co. v. Hurd*, LR 5 PC 221, 240: 22 DR 492 PC.

19 *Rama v. Raja*, 2 Mad. HC 114; *Peddammuthulaty v. Timma*, 2 Mad. HC 270, 275.

20 *Kissen v. Kally*, 33 C 633, 636, *Kedar v. Manu*, 16 CWN 247; *De Bussche v. Alt*, 3 Ch D 236, 314: (1874-80) All ER Rep 1247; *Mokund v. Chotay*, 10 C 1061, 1063; *Jamnadas v. Atmaram*, 12 B 133, 138; *Wilmott v. Barber*, 15 Ch D 96, 105.

1 *Niaz v. Parshotam*, 53 A 374, *Governor of Orissa State v. Shiva prasad*, AIR 1963 Orissa 217.

The case of a person who wishing to sell his house causes bogus offers to be made to him comes under the section and not the Exception.² The Exception does not make any mention of fraud; therefore, the means of discovering the truth with ordinary diligence cannot be an answer to the claim of a party for relief from a contract to which he was induced to enter by means of a false assertion or active concealment such as constitutes fraud as defined in S. 17. If a seller of property gives an answer that he knows to be false, he is guilty of a breach of duty and of misrepresentation. In order that the remedies given by S. 19 can be availed of it must be proved that the consent of the party who claims to avoid the contract was caused by fraud or misrepresentation and that he was actually deceived. Under the English law the fact that a party, who has been induced to enter into a contract by fraudulent misrepresentation or wilful concealment, might, by ordinary care or proper enquiry, have known the truth, is no defence to an action for rescission of the contract if the party was really deceived.³ But under the Exception even if the party is deceived by misrepresentation or by silence fraudulent within the meaning of S. 17, he cannot avoid the contract if he had the means of discovering the truth with ordinary diligence. The Exception has not been applied,⁴ where there has been an active concealment of an important fact in order to deceive the other party and induce him to enter into the contract.⁵ A purchaser was held entitled to rescind a contract when the amount of ground rent was not stated in the particulars of sale and he thought that the property was not subject to any ground rent. Knowledge could not be imputed to him from the mere fact that if he had not been careless and had made inquiry he could have ascertained the fact, so specific performance of the contract was refused.⁶ A vendor misrepresenting that the purchaser could take immediate possession of a plot of land when a lease was subsisting, the sale was voidable.⁷ But a purchaser cannot refuse to complete a contract on the ground of misrepresentation where knowledge of the true state of facts can be imputed to him.⁸ Where a person relying on the representation made to him by an auctioneer, he being unable to follow the particulars of sale read out in English, made a bid at the auction which was accepted, the Exception did not apply and he was allowed to rescind the contract.⁹ If the vendor be informed by the purchaser of his object in buying, and the lease contain covenants which will defeat that object, mere silence will be equivalent to misrepresentation. Thus,

2 *Apcar v. Malchus*, 1939 C 473.

3 *Directors, Venezuela Ry. v. Kisch*, LR 2 HL 99, 120; *Reynell v. Spyrre*, 1 DGM & G 660, 708: 42 ER 710: 21 LJ Ch 633.

4 *Morgan v. Govt. of Haidarbad*, 11 M 419; see *Jogendra v. Chandra*, 42 C 28.

5 *Premchand v. Ram*, 140 IC 209; *R. C. Thakkar v. Gujrat Housing Board*, AIR 1973 Guj. 34, 43.

6 *Jones v. Rimmer*, 14 Ch D 588.

7 *Kopparthi v. Palleti*, 1940 M 560.

8 *Hargrave v. Dyer*, 10 Ves. 505: (1803-18) All ER Rep 243.

9 *Mahomed v. Harperink*, 36 LA 32, duty of Court re representation made in Court sale set forth.

the vendor is bound to disclose to the purchaser that a certain word in the lease did not have the meaning which persons residing in the district are entitled to attach to it.¹⁰ Under the Exception, a contract, even if caused by misrepresentation, would not be voidable, if the defendant had the means of discovering the truth with ordinary diligence. The application of the Exception is not restricted to cases where the party is fixed with constructive notice of the true state of affairs.¹¹

In *Smith v. Land and House Property Corporation*¹² Bowen L. J. said:

"In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

7. **Ordinary diligence.**—In a case coming under the Exception the question arises what would constitute reasonable care or diligence on the part of the plaintiff.¹³ Ordinary diligence means the diligence of an ordinary man who does not pretend to possess special knowledge or skill. In *Re Nursey Spinning and Weaving Co.*,¹⁴ the Exception was held to have no application because no ordinary diligence would have enabled the bank to discover that the company was not liable on the bill. Where, however, there was a contract for the purchase of rice and a purchaser sought to set aside the contract on the ground of breach of warranty, namely, that the goods delivered were of inferior quality, the case came under the Exception because the purchaser might have discovered the truth with ordinary diligence.¹⁵ Under the English law the effect of a false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.¹⁶

8. **Explanation.**—A party who actually knows the truth is not entitled to complain of misrepresentation. A party that takes up this plea must show that the other party knew that to be untrue which was represented to him as true.¹⁷ In an action of fraud, therefore, the plaintiff (1) must establish actual fraud which is to be judged of by the nature and character of the representation made, (2) must establish that this fraud was an inducing case to the contract.¹⁸ Thus, where a purchaser did not inspect an article when he had an opportunity of doing so, and there was a latent defect in the article which was concealed by the vendor, the purchaser could not have the contract

10 *Jogendra v. Chandra*, 42 C 28.

11 *Mohun Lall v. Sri Gungaji Mills*, 4 CWN 369.

12 (1884) 23 Ch D 7.

13 *Harilal v. Mulchand*, 52 B 883.

14 5 B 92, 95.

15 *Shoski v. Nobe*, 4 C 801.

16 *Redgrave v. Hurd*, 20 Ch D 1, 13-15; (1881-85) All ER Rep 77.

17 *Pride v. Macaulay*, 2 DGM & G 339, 346; see *Watson v. Claremont*, 12 QB 858, 864.

18 *Smith v. Chadwick*, 9 AC 187, 190; (1881-85) All ER Rep 242.

rescinded, inasmuch as he was not misled by the attempt to conceal.¹⁹ If the vendor at the time of the contract does not know of the existing defect in the estate, the Court will enforce the contract; otherwise, perhaps, if the defect be known to the vendor, and be one which a prudent purchaser could not discover.²⁰

The principle underlying the Explanation to section 19 is that a false representation, whether fraudulent or innocent, is irrelevant if it has not induced the party to whom it is made to act upon it by entering into a contract.¹ An insurer cannot avoid a contract of insurance containing misrepresentations about facts which are not material. In a Calcutta case, one S booked a consignment of tea, which was insured with a general insurance company. According to the policy and the proposal form the consignment was in respect of Pekoe dust but in fact it contained ordinary dust tea. It was not necessary for the proposer to mention the particular brand or quality of tea: it would have been sufficient if the proposer simply mentioned 'tea' and nothing else. Nor did the proposal form require the proposer to mention the price or the value. Held that the insurer was not entitled to rely on the misrepresentation to impeach the contract.²

19A. Power to set aside contract induced by undue influence.—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

(a) A's son has forged B's name to a promissory note. B under threat of prosecuting A's son obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a moneylender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

The section.—The section has been inserted and the words 'undue influence' deleted from the previous section by Act 6 of 1899, S. 3 on the following grounds given by the Select Committee: "A contract obtained by

¹⁹ *Horsfall v. Thomas*, 81 LJ Ex. 322, reld. to in *Carlisk v. Salt*, (1906) 1 Ch 335.

²⁰ *Lucas v. James*, 7 Hare 410; 68 ER 170; 18 LJ Ch 529.

¹ *Mithoolal v. L. I. C.*, AIR 1962 SC 814, 820.

² *Hindustan etc. Insurance Soc. v. Punam Chand*, AIR 1971 Cal 285.

influence is on a different footing from a contract obtained by fraud. In the case of the latter, a party who, with knowledge of the fraud, has taken any benefit under the contract, is held to have elected to affirm it; but where a contract has been obtained through the exercise of undue influence it is necessary that the Court should have power to relieve the party who acted under the undue influence, even although he may have received some benefit under the contract. On the other hand, where such benefit has been received the Court ought to have full power to impose such conditions as may be just upon the party seeking relief." With the terms of the second paragraph compare Ss. 35, 38 and 41 of the Specific Relief Act.

Effect of undue influence.—Illust. (b) makes it quite clear that the section is intended to give express sanction to the Courts to relieve a borrower against the oppressive terms of his contract.³ In *Dhanipal Das v. Raja Maneshwar*⁴ the bond in suit was set aside on the ground of having been executed under undue influence. Where such influence is continued to be exercised upon a party until his death, and he had no opportunity of cancelling the contract, it is open to his representatives to raise in defence the plea of undue influence.⁵ The transferee of a bond is invested with all the rights and remedies of the transferor, including the option of avoiding the agreement in the bond, on the ground that it had been caused by undue influence.⁶ The remedy of setting aside a contract on the ground of undue influence may be lost by acquiescence,⁷ or by the exercise of the right of choice or election.⁸ Terms and conditions referred to at the close of the section, which may seem just to a Court, may be imposed by it without the consent of the party.⁹ When a sale deed was executed under circumstances which has given an unfair advantage to the dominating party, that sale cannot be upheld.¹⁰ The remedy of setting aside a contract on the ground of undue influence may be lost by acquiescence.¹¹ Undue influence may be set up by way of defence to an action and it is not necessary to take steps to set aside the agreement. The representative of a party who was induced to enter into a contract by undue influence may by way of defence plead undue influence.¹² It has been held that the exercise of undue influence might vitiate the contract though the person exerting the influence is not himself a party to the contract but exerted it for the benefit of a third party with the knowledge of that party. A transaction, therefore, would be voidable against a third party if it is the result of undue influence and that party took the benefit.¹³

3 *Poma v. Gillespie*, 31 B 348.

4 28 A 570 PC.

5 *Rash Behari v. Haripada*, 59 CLJ 387; see *Manbhari v. Sri Ram*, 34 ALJ 1215.

6 *Ram v. Bhagwan*, 159 IC 320.

7 *Seetharama v. Bayanna*, 17 M 275.

8 *Kunja v. Hara*, 1943 C 162.

9 *Sundar Rai v. Suraj Bali*, 47 A 932.

10 *Sheocharan v. Channulal*, 132 IC 452.

11 *Seetharama v. Bayanna*, 17 M 275.

12 *Manbhari v. Sri Ram*, 34 ALJ 1215.

13 *Lingo v. Dattatraya*, 39 Bom. LR 1233.

19-B. Definitions of "maintainer" and "champertous agreement": (a) "Maintainer" means a person who gives assistance or encouragement to one of the parties to a suit or proceeding and who has neither an interest in such suit or proceeding nor any other motive recognised by law as justifying his interference.

(b) "Champertous agreement" means an agreement whereby the nominal plaintiff agrees with the maintainer to share with or give to him a part of whatever is gained as the result of the suit maintained.

19-C. Power to set aside champertous agreement: A champertous agreement may be set aside upon such terms and conditions as the Court may deem fit to impose.

Sections 19-B and 19-C were added by the Central Provinces & Berar Indian Contract (Amendment) Act, XV of 1938 for local application.

20. Agreement void where both parties are under mistake as to matter of fact.—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

1. Mistake of fact.—A mutual mistake on a matter of fact essential to the agreement would make an agreement void. There may be some defect that is unknown to both the parties whereby the contract is so fundamentally affected that there is good ground for holding the contract void because of a mutual mistake of fact.¹⁴ Where a contract of sale relates to specific goods which do not exist, the case is not to be treated as one in which the seller warrants the existence of those specific goods, but as one in which there has been a

¹⁴ *Nursing v. Chutto*, 50 C 615 reld. to in *Harilal v. Mulchand*, 52 B 883.

¹⁵ *Barrow v. Phillips*, (1929) 1 KB 574.

failure of consideration and mistake. The result will be the same where not all but some of the goods have ceased to exist, *e.g.*, been stolen or taken away.¹⁶ An agreement for the sale of shares in a company, entered into in ignorance of the fact that a petition for winding up of the Company had been presented, is not valid.¹⁶ Where there is a mutual mistake as to a fact which goes to the root of the contract and frustrates the object of the agreement the section will apply. Illust. (a)¹⁷ indicates what the legislature intended to enact under the section. Where however one of the parties to an agreement knows a fact which makes his bargain an advantageous one and that fact is unknown to the other party to the agreement, the other party remains bound by the contract unless there is an obligation on the party knowing the fact to disclose it to the other party. Thus, a vendor cannot refuse to give delivery under a contract unless a further sum equal to the proposed excise duty, subsequently imposed, was paid.¹⁸ The parties may be mistaken in the identity of the contracting parties, or in the existence of the subject matter of the contract at the date of the contract, or in the quality of the subject matter of the contract.¹⁹

So also a person cannot plead a mistake when his ignorance of facts is due to his own negligence. In such a case he is treated as if he had the knowledge.²⁰ Where the Government acquired land, paid the compensation money, then discovered that the land belonged to it, the money could not be recovered as there was not a total failure of consideration, for it got rid of whatever claim the defendant may have had to the land.¹ Where under a contract of insurance, the insured is replaced with certain articles for a missing article after a fruitless search for it, the settlement is not rescinded or reopened on the subsequent discovery of the missing article. The fact that the replacement agreed to had not been completely effected makes no difference.² One fundamental distinction between this section and S. 55 T. P. Act consists in the fact whether both parties to the contract or the seller alone has knowledge of a defect in the property sold, in the latter case, the element of fraud intervenes.³

2. **Both parties.**—Where a contract is the result of mistake on both sides, then there is no contract at all between the parties, the party who has advanced money is entitled to claim refund.⁴ A mistaken belief as to the status of one of the parties will not avoid the agreement.⁵

A contract cannot be avoided by the purchaser when he has knowledge of the defect in title or when ignorance of the defect has not been established by

16 *Re London Bank*, LR 1 Ch 433.

17 *Cf. Couturier v. Hastie*, 5 HLC 673; (1843-60) All ER Rep 280; *Joyti v. Seddon*, 1940 P 516 (the point cannot be raised for the first time in appeal).

18 *Chin v. Adamjee*, 146 IC 440.

19 *Bell v. Lever Bros.*, 1932 AC 161, 217: (1931) All ER Rep 1. See S. 13 note.

20 *Re Metcalfe*, 13 Ch D 236; *Tamplin v. James*, 15 Ch D 215: (1874-80) All ER Rep 560.

1 *Secretary of State v. Tatyasaheb*, 56 B 501, 34 Bom. LR 791.

2 *Holmes v. Payne*, (1930) 2 KB 301: (1930) All ER Rep 322.

3 *Jodha v. A. Hotels*, 1950 L 106.

4 *Muttu v. Venkata*, 1935 M 287.

5 *Tilwandas v. Abbas*, 159 IC 772.

evidence.⁶ The mistake of one party, therefore, inducing him to enter into a contract is of no consequence if the other party is not implicated in the mistake. Thus, where 25 shares were allotted to each of the persons named as directors, in order to qualify them for the office, and A, one of the persons, consented to act as director and actually did so act, afterwards under a mistake and in ignorance that any share had been allotted to him, applied for 20 shares, which were allotted to him, *held*, he was liable for the 45 shares.⁷ Where a party bought his own land by mistake, equity relieved against the mistake by compelling the vendor to make over the consideration money as he had no right to it.⁸ An obvious mistake in a written instrument as to the amount of a mortgage,⁹ or an omission of a name in one part of an instrument,¹⁰ may be rectified. A contract intended to have been entered into between the plaintiff and the defendant was by the mistake of the broker purported to have been executed between the defendant and a third person, *held*, there was a valid contract between the plaintiff and the defendant.¹¹ Where a plaintiff alleged that he had paid in excess of what was due under a contract of purchase and asked for a refund of the excess, under the section he could have the contract avoided on the ground of mutual mistake, or under S. 31 of the Specific Relief Act he could apply to have the instrument rectified.¹² Where, however, an error which is sought to be taken advantage of by one party has been induced by the other party, the contract may be avoided.¹³ An agreement to terminate a definite specified contract is not void on the ground of mistake if it turns out that the agreement had already been broken and could have been determined otherwise.¹⁴

3. **Matter of fact.**—It may not always be easy to say whether a mistake has been made as to a matter of fact essential to the agreement. An auction sale of a plot of land in respect of which notice was duly published, a fact unknown to both the parties, is void on the ground of mistake.¹⁵ A mistake, in order to avoid a contract, must be a mistake as to an existing fact. An erroneous expectation which events entirely falsify has no effect. An erroneous supposition that Government assessment will not be enhanced will not invalidate a contract.¹⁶ Where a settlement is entered into between the Government and the plaintiff, both parties believing that they were the superior holders of the land, but it transpires that they are not so, the agreement is void in respect of the part of the land settled under a common mistake.¹⁷ Mistake to be a

6 *Secretary of State v. Yellapeddi*, 87 IC 644.

7 *Re British American Telegraph Co.*, LR 14 Eq. 316.

8 *Bingham v. Bingham*, 1 Ves. Sen. 126.

9 *Scholefield v. Lockwood*, 32 Beav. 436.

10 *Dent v. Clayton*, 33 LJ Ex 503.

11 *Mahomed v. Chutterput*, 20 C 854.

12 *U. Shwe v. Kyaw*, 125 IC 259.

13 *Singhasan v. Jadu*, 117 IC 315.

14 *Bell v. Lever Bros.*, 1932 AC 161, 233: (1931) All ER Rep 1.

15 *Nursing v. Chutto*, 50 C 615 reld. to in *Ramlal v. Suradhani*, 63 C 124; *Shahabuddin v. Vilayat*, 95 IC 614.

16 *Babshetti v. Venkatramana*, 8 B 154, 158.

17 *Secretary of State v. Jeshindhai*, 17 B 407.

ground for setting aside a contract must be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. A mistake of this sort prevents there being that intention which the common law regards as essential to the making of an agreement or the transfer of money or property.¹⁸

A contract based on a misunderstanding of its terms is not enforceable between the parties.¹⁹ Where the memorandum upon a policy of insurance was framed under a mistake, and not in accordance with the terms verbally agreed upon, there could be no agreement, the premium paid must be refunded.²⁰ A mistake as to the meaning of words spoken may prevent the parties being *ad idem*, but not an erroneous construction of words, unless the mistake as to the meaning of written words was induced by the other party or was accompanied by a mistake as to the subject matter of the contract.¹ A contract to be enforceable must be one of which the terms are understood by both parties. Thus a contract to accept a lease based on a misunderstanding of a question of fact as to what the terms were does not constitute an enforceable contract between the parties.² Where it is agreed that a building contractor will be paid on his bills being certified by an architect and the contractor submits a bill so certified, the employer can impeach it only on the ground of fraud or collusion, it cannot be impeached for mere negligence or mistake for which the employer may have his remedy against the architect, but the contractor is bound to be paid.³

Where at the date of a contract for the sale of a life policy the assured was believed by both parties to be alive, but he was in fact dead, the contract could not be enforced.⁴ A contract for the sale of an annuity for life becomes void on the death of the annuitant before the completion of the contract.⁵ A policy of insurance on a vessel is affected by the loss of the vessel at the time of insurance but not the state of repair at the time⁶; therefore contracts of marine insurance contain the expression "lost or not lost". An agreement for the sale of shares of a company, where the transfer has not been completed, is not binding upon the purchaser if made in ignorance of the fact that a petition for the winding up of the company had been presented.⁷ Where goods are stolen in transit before a contract of sale, the contract is void.⁸ Where parties in ignorance of the fact that the litigation had already terminated in favour of

18 *Fire Insee. Society v. Price Ltd.*, 32 ALJ 609 PC; *Chiman v. Divan*, 1932 B 151.

19 *Srinivas v. Rajkishore*, 148 IC 207.

20 *Fowler v. Scottish L. I. Society*, 28 LJ Ch 225.

1 *Wilding v. Sanderson*, (1897) 2 Ch 534, 550; 65 LJ Ch 684.

2 *Srinivas v. Rajkishore*, 148 IC 207.

3 *Alimahomed v. Pandurang*, 18 Bom. LR 156.

4 *Scott v. Coulson*, (1903) 2 Ch 249; see *Stuart v. Freeman*, (1903) 1 KB 47; *Cochrans v. Willis*, LR 1 Ch 58; 35 LJ Ch 36.

5 *Kennedy v. Thomassen*, (1929) 1 Ch 426, 434; (1928) All ER Rep 525; *Strickland v. Turner*, 7 Ex. 208; 22 LJ Ex. 115, approved in *Turner v. Greene*, (1895) 2 Ch 205, 210; 64 LJ Ch 589.

6 *Barker v. Janson*, LR 3 CP 303.

7 *Re London & Co. Bank*, LR 1 Ch 433.

8 *Governor General v. Kabir*, 1948 Pat. 345.

the present plaintiff, entered into a compromise and executed certain documents in pursuance of that compromise, the documents executed were inoperative.⁹

Where there is a common mistake as to the title of any property sold the Court will give relief, *e.g.*, where a vendor purports to sell his freehold interest when he has a leasehold interest and the property in fact belongs to the purchaser.¹⁰ The general rule that a purchaser is entitled to require a good title is subject to the exception that where the purchaser at the time of the contract knows the property to be subject to encumbrances which cannot be got rid of, he cannot resist specific performance on the ground of those encumbrances. But where parties were ignorant of restrictive covenants on the lands sold and they were contracting on the footing that a good title was to be made, and a good title could not be made, the purchaser is not bound by the contract.¹¹

Whether a misdescription or mistake as regards the area of land contracted to be sold, when there is a stipulation that for any error or misstatement a contract shall not be annulled, avoids the contract, depends on the rule that where misdescription, although not proceeding from fraud, is in a material point and so far affects the subject matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such a case the contract is avoided altogether, and the purchaser may be considered as not having purchased the property. The English Courts are from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for or not be compelled to take that which he did not mean to have.¹² The section is not applicable where the purchaser gets substantially the same thing as has been contracted to be sold. He is entitled to compensation for deficiency in the area of land purchased and it makes no difference that the mistake is discovered after the conveyance is executed and registered.¹³ But when the words of description of the quantity are qualified by such words as "more or less", or "by estimation", a purchaser is not entitled to any abatement out of the purchase money for a slight deficiency.¹⁴ Where the owner of a plot of land agreed to demise to A the minerals under it to the west of a certain fault, the quantity of land being described as supposed to be 83 acres or thereabouts, and to B the minerals under the land to the east of the fault supposed to contain 98 acres or thereabouts, but the former area was found to consist of 8 acres only, the agreement could not be enforced.¹⁵ But where upon the dissolution of a partnership the accounts as settled were taken as correct and the plaintiff, though he had the means of checking them, failed to do so, the Court refused to give relief on the ground of a common mistake. No account would ever be settled if by not examining it a party to a settlement, several years afterwards, could

⁹ *Ananda v. Kali*, 29 CLJ 526.

¹⁰ *Jones v. Clifford*, 3 Ch. D 779; *Cochrane v. Willis*, LR 1 Ch 58; 35 LJ Ch 36.

¹¹ *Ellis v. Rogers*, 29 Ch D 661, 670.

¹² *Jacobs v. Revell*, (1900) 2 Ch 858; see *Meaney v. Walker*, 1947 A 332.

¹³ *U. Pan v. Po.*, 100 1 C 327.

¹⁴ *Winch v. Winchester*, 1 V & B 375; (1803-13) All ER Rep 564.

¹⁵ *Davis v. Shepherd*, LR 1 Ch 410.

insist that there was a common mistake.¹⁶ In the bargain and sale of an existing chattel by which the property passes, the law does not, in the absence of fraud, imply any warranty of the good quality or condition of the chattel so sold. The simple sale, therefore, of a ship does not imply any contract that it is then seaworthy, or in any serviceable condition. But the sale of a chattel as being of a particular description does imply that the article sold is of that description.¹⁷ Where the plaintiff after completion discovered a defect of title which, if he had chosen to investigate, he would have discovered before completion and there was no contract to take compensation for defects, the plaintiff was not entitled to any compensation.¹⁸

A consent decree is like any other contract; such a contract may be set aside on the ground that its execution has been obtained by fraud or gross mistake, notwithstanding that the contract has received judicial sanction in the form of a decree. When a decree is rectified on the ground of mistake the money paid under such a decree is also recoverable. Gross mistake is similar in its effect to fraud or unconscionable dealing.¹⁹ To constitute consent to a consent decree there must be a bargain between the parties and not a mere acceptance of the order offered.²⁰ A compromise entered into by parties and recorded in Court will be set aside if it appeared that the arrangement had been brought about by entire mistake of both parties and of the Court with regard to the subject matter of the agreement.¹ But a compromise will not be set aside where a party is not under a mistaken belief as to a matter of fact or where it was a mistake about a matter of fact but not essential to the agreement. Where the essence of a compromise is the recognition of antecedent title of the plaintiff, independently of the fact whether it actually exists or not, the fact that the title actually lies in the plaintiff does not avoid the compromise on the ground of mutual mistake.² Where acting upon general instructions given by a client to his counsel to compromise a litigation, counsel consented to a compromise under a misapprehension, such as, where intending to concede one thing he inadvertently concedes another, or where the counsel of both sides are not *ad idem*, neither the counsel nor his client is bound by the compromise and the Court will set it aside. The Court will accept the statement of a counsel if made from his place at the bar without requiring it to be made on oath.³ Even an order of Court made by consent can be impeached, not only on the ground of fraud, but upon any ground which invalidates any less formal agreement, unless it affects the interest of a third party or is based on a compromise of doubtful rights.⁴ If a consent is given through error or mistake there can be no doubt that the Court will allow it to be withdrawn if the order has not

16 *Laing v. Campbell*, 36 Beav. 3.

17 *Barr v. Gibson*, 7 LJ Ex 124.

18 *Clayton v. Leach*, 41 Ch D 103: (1886-90) All ER Rep 446.

19 *Sakhiblal v. Muhammad*, 154 IC 393.

20 *Rajkumar v. Shiva*, 1939 C 500.

1 *Soloman v. Abdul*, 6 C 687, 706.

2 *Secretary of State v. Nabi Bakhsh*, 100 IC 730.

3 *Hickman v. Berens*, (1895) 2 Ch 638.

4 *Huddersfield Banking Co. v. Lister*, (1895) 2 Ch 273: (1895-99) All ER Rep 963.

been drawn up. If a decree has actually been passed a fresh action is usually necessary to have the compromise set aside.⁵ A consent decree can be set aside on the same grounds as an agreement.⁶ Relief can be given on the ground of mistake in the case of a sale held through the intervention of the Court.⁷ The contrary view has also been upheld and it has been laid down that the doctrine of *caveat emptor* applies to Court sales.⁸

4. Essential to the agreement.—The difficulty in every case has been to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going as it were to the root of the matter, or only to some points, when even though material an error as to which does not affect the substance of the whole consideration.⁹ The sureties to an administration bond are not discharged from liability by reason of the invalidity of the grant of letters of administration or of the mistake of Court in accepting the bond. The mistake in such a case has been regarded as a mistake as to matter of fact not essential to the agreement.¹⁰ Where on an assignment by sale of a mortgage claim, it was agreed that the mortgagee shall not be liable for any defect in the claim transferred, it subsequently transpired however that the mortgage was inoperative because the mortgage deed was attested by one witness only, the assignment was not voidable "inasmuch as the vendee has chosen to contract to take the claim with all its defects and to hold the vendor not responsible for the consequences".¹¹ Where a property sold was described as "enclosed by a rustic wall with tradesman's side entrance", but the wall did not form part of the property and the entrance was used on sufferance and these facts were unknown to the vendor, the purchaser was entitled to have the contract rescinded, though the condition of sale provided that compensation should be given for errors in the description of the particulars and the sale should not be annulled.¹²

The lessee in respect of an area of 5,000 acres of land fit for growing sisal granted a licence for the exploitation of sisal and the licensee agreed *inter alia* that he would deliver to the licensor sisal fibre in average minimum quantities of 50 tons per month. Both parties believed, contrary to fact, that the sisal area was capable of producing that quantity of fibre every month. The agreement was held to be void on the ground of mutual mistake.¹³

When goods, whether specific or unascertained, are sold under a well-known trade description without misrepresentation, innocent or guilty, and without breach of warranty, the fact that both parties to the contract are unaware that goods of that known trade description lack some particular quality does not

5 *Jamshedji v. Sorabji*, 25 Bom. LR 1137.

6 *Singhasan v. Jadu*, 117 IC 315.

7 *Uzir v. Nasimannesa*, 116 IC 634.

8 *Amba v. Ramgopal*, 55 A 221.

9 *Kennedy v. Panama Mail*, LR 2 QB 580, 588: 36 LJ QB 260.

10 *Debendra v. Administrator General*, 33 C 713, on app. 35 IA 109; fold in *Sarat v. Rajoni*, 12 CWN 481, case of surety of a guardian.

11 *Sada Kavur v. Tadepally*, 30 M 284, 290.

12 *Brewer v. Brown*, 28 Ch D 309.

13 *Sheikh Brothers v. Ochaner*, (1957)2 WLR 254 PC.

constitute such a mutual mistake of fact as will render the contract a nullity even though, from the point of view of the buyer, the mistake may turn out to be of a fundamental character.¹⁴

The plaintiffs, London merchants, were asked by their Egyptian house for "Moroccan horsebeans described here as feveroles". Their representative did not know what feveroles were, and asked the defendants' representative, who after making inquiries told him that feveroles were just horsebeans and that his firm could procure them. After negotiations on that basis, written contracts were concluded (1) between North African suppliers and the defendants, (2) between the defendants and the plaintiffs, and (3) between the plaintiffs and Egyptian buyers, for the sale and purchase of "horsebeans", payment to be in London by confirmed irrevocable letters of credit against shipping documents. When the horsebeans, shipped from Tunis, were received by the Egyptian buyers, the latter found that the commodity supplied was not feveroles, but another type of bean; but as they had paid for the goods, they accepted them and claimed damages.

The resulting disputes between the plaintiffs and the defendants were referred to arbitration, and awards made in favour of the defendants. The plaintiffs then started proceedings in the High Court, claiming, *inter alia*, rectification of the contracts by the addition of the word "feveroles" after the word "horsebeans", intending if successful to claim damages on the contracts as rectified.

Pilcher J. found that both parties had made an oral agreement by which they intended to deal in "horsebeans of the feverole type", but that owing to a mutual mistake innocently induced by the sellers' representative, all the written contracts were for horsebeans; and he allowed the rectification asked for by the plaintiffs. On appeal by the defendant, it was held that, as the concluded oral agreement between the parties was for horsebeans, and the written contracts were in the same terms, the remedy of rectification, available only where there was clear proof that a written agreement did not correspond with the contract into which the parties entered, as expressed by their outward acts, was not available to make new contracts for feveroles between the parties.¹⁵

In the same case¹⁵ Denning L. J. expressed the view that though both parties were under a fundamental mistake as to the nature of the subject-matter, the contract was not a nullity, for where parties to a contract were to all outward appearances in full and certain agreement, neither of them could set up his own mistake, or the mistake of both of them, to make it a nullity *ab initio*.

At the present day the position appears to be that when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning. Even a common mistake as to the subject-matter does not make it a nullity. Once the contract is outwardly complete the contract is good unless and until it is set aside for

14. *Harrison v. Buntin*, (1953) 2 WLR 840; (1973) 1 All ER 903; (1953) 1 QB 548.

15. *Ross v. Pim*, (1953) 3 WLR 497, 504, CA; (1953) 2 All ER 729.

failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground.¹⁶

5. **Explanation.**—Mistake as to a matter of fact must be a mistake at the time when the agreement was entered into. If, subsequently, events turned out more favourably to one of the parties the other cannot set aside the contract on the ground of mistake.¹⁷ The section does not apply where an uncertainty of title of one party over a thing is known to the other who still enters into the contract in the expectation that things will turn out all right in the end.¹⁸

21. Effect of mistakes as to law.—A contract is not voidable because it was caused by a mistake as to any law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake of fact.

Illustrations

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

Mistake of law.—It is said '*Ignorantia juris non excusat*' (Ignorance of law is no excuse), but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. When the word is used in the sense of denoting a private right, that maxim has no application. It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat*.¹⁹ Private right of ownership is a matter of fact; it may be the result also of a matter of law; but if the parties contract under a mutual mistake and misapprehension as to their respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a mistake.²⁰ The construction of a contract is clearly a matter of law; if a party acts upon a mistaken view of his rights under a contract he is no more entitled to relief in equity than he would be in law.¹ As a general rule mistake as to the legal effect of what a

16 *Solle v. Bucher*, (1950)1 KB 671, 693; (1953)2 All ER 739; *Frederick E. Rose (London) Ltd. v. W. H. Pim Jr. & Co. Ltd.*, (1953)2 QB 450; *Oscar Chess Ltd. v. Williams*, (1957)1 WLR 370, 373, CA: (1957)1 All ER 325.

17 *Shiblal v. Collector of Bareilly*, 16 A 423, 435; *Chandanmull v. Clive Mills*, 48 C 257.

18 *Ram Tuhul v. Biseswar*, 2 IA 131.

19 *Kiriri v. Dewani*, (1960)2 WLR 127 PC: (1960)1 All ER 177.

20 *Cooper v. Phibbs*, LR 2 HL 170, *re*fd to in *Allcard v. Walker*, (1896)2 Ch 369; see *Beauchamp v. Winn*, LR 6 HL 223, 234; *Ramanuj v. Gajaraj*, 1950 M 146; *Rogers v. Ingham*, 3 Ch D 351, 357: (1874-80) All ER Rep 209; commented in *Appavoo v. S. I. Ry.*, 56 MLJ 269.

1 *Directors &c. v. Johnson*, 6 HLC 798, 810; *Powell v. Smith*, LR 14 Eq. 85; *Ghanisam v. Giritia*, 1944 N 247.

party is signing when he has read the document does not avail.² A compromise made by a party cannot be set aside on the ground that he made it in ignorance of the law in force in British India.³ In English law the question has been complicated by the fact that in equity the line between a mistake in law and a mistake in fact has not been always sharply drawn.⁴ A misrepresentation of law is this: When you state the facts and state a conclusion of law, so as to distinguish between facts and law, the man who knows the fact is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. There is not a single fact connected with personal status that does not more or less involve a question of law.⁵

The Indian law is that a mistake as to the law in India resulting in the payment by one person to another, and making it inequitable that the payee should retain the money, is no ground for relief. Where a consignee of goods in taking delivery of them from a railway company paid a surcharge under a mistaken view of the law that it was payable by him, he was not entitled to claim a refund of the amount so paid.⁶ So also where a person obtained a lease under an erroneous view of the law the lease could not be set aside.⁷ Where a mortgagee took a mortgage with a full knowledge of a prior unregistered mortgage under a mistaken impression that on registration his mortgage would have priority, the contract was not voidable as it was caused by a mistake as to a law in force in British India.⁸ An error of law, therefore, does not vitiate a contract, much less will it annul a conveyance after many years.⁹ Where the property of a judgment debtor had been attached in execution for a sum claimed due under a decree, which sum, in fact, included interest not awarded by the decree, *held*, the mistaken belief of the parties to the agreement that interest could be recovered by proceedings in execution was a mistake of law and not of fact, it therefore did not render the agreement voidable.¹⁰ Where parties at the time when they entered into an agreement believed that a certain kind of lease carried with it mineral rights, but the Privy Council in two subsequent decisions threw grave doubts on the title of the lessee to the mineral rights, the mistake having been then discovered, it was held that the agreement could not stand.¹¹ The section deals only with mistakes of law which cause a contract.¹² Under the Punjab Alienation of Land Act the possession by a mortgagee cannot exceed 20 years. A mortgage authorising the

2 *Blay v. Pollard*, (1930) 1 KB 628, 633: (1930) All ER Rep 609. See S. 13 note.

3 *Ram v. Prayag*, 8 C 138 relied on in *Allahbux v. Nusservanji*, 164 IC 43, 49, *Shiba v. Srish*, 1949 PC 297.

4 *Daniell v. Sinclair*, 6 AC 181, 190, see cases cited.

5 *Eaglesfield v. Londonderry*, 4 Ch D 693, 702.

6 *Appavoo v. S. I. Ry.*, 56 MLJ 269.

7 *Sahiban v. Madho*, 4 ALJ 475.

8 *Jowand v. Sawan*, 149 IC 1030.

9 *Vishnu v. Kashinath*, 11 B 174.

10 *Seth Goculdass v. Murli*, 5 IA 78, but see *Rakmabi v. Govind*, 6 Bom LR 421.

11 *Ram v. Ganesh*, 21 CWN 404; *Cooper v. Phibbs*, LR 2 HL 149 fold; *Kuchwar, L. & S. Co. v. Secretary of State*, 16 Pat 159.

12 *Jagadish v. P. E. E. Corp.*, 1946 C 245.

mortgagee to retain possession until redemption is not void. The mistake as to law does not make the contract void, the condition only is void.¹³

The mistake with regard to the law of registration upon the validity of the deed of assignment of lease will be a mistake of law and under section 21 the contract will not be void on that ground.¹⁴

It has been said that the Court has power to relieve against mistakes in law if it be satisfied that the consent of a party has been induced by those mistakes.¹⁵ But a compromise and family arrangement entered into, in which all the parties acted under the advice of a professional man, cannot be set aside at the instance of one of the parties because he was ignorant of his rights, in the absence of fraud or explanation to the parties of what their rights were, or unless the matter involved a question of foreign law.¹⁶

22. Contract caused by mistake of one party as to matter of fact.—A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

The section.—See note under previous section. A contract is not voidable where the mistake is not mutual, but only one of the parties labour under a mistake as to a matter of fact.¹⁷

A unilateral mistake could, in the absence of fraud, only afford ground for rescission if the mistake was induced by some innocent misrepresentation made by or on behalf of a party or by some misleading conduct on his part.¹⁸

23. What considerations and objects are lawful and what not. The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

13 *Sochet v. Hadayat*, 140, IC 868.

14 *Kalyanpur Lime Works v. State of Bihar*, AIR 1954 SC 165.

15 *Stone v. Godfrey*, 23 LJ Ch 769, 774.

16 *Stewart v. Stewart*, 6 Cl & F 911, 964; *Re Roberts*, (1905)1 Ch 704.

17 See *Haji Abdul v. Bombay and Persia S. N. Co.*, 16 B 561.

18 *Hasham v. Zenab*, 1960 AC 316; (1960)2 WLR 374, 381, PC; *Riverlata Properties Ltd. v. Paul*, (1974)2 All ER 657 CA.

Illustrations

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (XLV of 1860).

1. The section.—The section enumerates six cases in which the consideration or the object is unlawful. But Ss. 23, 26 and 27 cannot be regarded as exhausting all the instances of agreements which are contrary to public policy. A contract is not affected by S. 23 where its object is not to defeat the provisions of any law.¹⁹ A contract may be unenforceable yet not unlawful within the meaning of this section.²⁰ The objection that a contract is illegal

¹⁹ *Lal v. Kimman*, 80 IC 560; *Balkishan v. Laxman*, 1951 N 187.

²⁰ *Debi v. Kusum*, 10 Pat 68.

must be considered by the Court even though taken late.¹ When a contract is invalid, every part of it, including the clause as to arbitration contained therein, must also be invalid.²

2. Object.—The word 'object' in this section has not been used in the same sense as 'consideration', but means purpose or design. Thus, a consideration for an agreement may be the receipt of a certain sum of money which is perfectly legal, but its object may be to defeat the provisions of the Insolvency Act, which is unlawful. Where the object of an assignment is fraudulent, the assignment is void and inoperative.³ No agreement can be void under the section unless both sides are concurring parties. It is the object of the agreement and not the motives of the parties that has to be considered.⁴

3. Forbidden by law.—A contract which is expressly forbidden and made criminal by statute can give no cause of action to a party who seeks to enforce it. But there always remains the question whether the contract is expressly or impliedly forbidden by an Act. It is perfectly settled that where a contract, which the plaintiff seeks to enforce, is expressly or by implication forbidden by any law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty, because such penalty implies a prohibition. It may be safely laid down that if the contract be rendered illegal it can make no difference in point of law whether the statute which makes it so has in view the protection of revenue or any other object. The sole question is whether the statute means to prohibit the contract.⁵ The imposition of a penalty may, however, be regarded in some cases as being for the purpose of revenue only and not with the object of vitiating the contract itself.⁶ For a contract allegedly made in breach of a statutory requirement to be struck with illegality it has to be shown that there is a sufficient nexus between the statutory requirements and the contract itself.⁷ On the other hand, there may be no penalty and the act may be illegal, if it be prohibited in the sense that it will not be recognised by the law as capable of being the foundation of any legal right.⁸ If an Act be intended only for the raising of revenue and the protection of that revenue, a clause imposing a penalty may well be construed, not as prohibiting a transac-

1 *Abdula v. Guruvappa*, 1944 M 387.

2 *Jaikishan v. L. Kaneria, & Co.*, AIR 1974 SC 1579; *Khardah Co. Ltd. v. Raymon & Co.*, AIR 1962 SC 1810; *Waverly Jute Mills v. Raymon & Co.*, AIR 1963 SC 90.

3 *Jaffer v. Budge Budge Jute Mills*, 33 C 702, on app. 34 C 289; *Sabava v. Yamanappa*, 35 Bom LR 345; *Matta v. Matta*, 1941 P 349.

4 *Nathusa v. Munir*, 1943 N 129; *Kashi v. Bapu*, 1940 N 305 FB.

5 *Whiteman v. Sadler*, 1910 AC 514, 525; *Dip Narain v. Nageshar*, 28 ALJ 45 FB; *Anderson v. Daniel*, (1924) 1 KB 138; 98 LJ KB 97; *Westby v. Westby*, 2 Dr & W (520); *Hormasji v. Pestanji*, 13 B 422; *Munshi v. C. Board*, 1943 O 99.

6 *Smith v. Mawhood*, 158 ER 552; 15 LJ Ex 149; *Victorian Syndicate v. Dott*, (1905) 2 Ch 624; *Bonnard v. Dott*, (1906) 1 Ch 740; 75 Ch 446, *reld. to Vithal v. Siwa*, 15 IC 983.

7 *Curragh Investments Ltd. v. Cook*, (1974) 3 All ER 658 Ch D.

8 *Cowan v. Milbourn*, 36 LJ Ex 124; LR 2 Ex 280; *Re Mahmoud & Ispahni*, (1921) 2 KB 716; (1921) All ER Rep 217.

tion in such a sense as to make it illegal and void, but as providing a means of enforcing the liability of the person on whom the penalty is imposed.⁹ A man who sets up a case in which he attempts to take advantage of his own wrong must prove his case to the hilt. The onus of establishing the illegality of a contract lies heavily on the person who sets it up.¹⁰ In the absence of evidence to show that a loan was taken for gambling in a public place or in a gambling house, the loan is not necessarily illegal and the creditor is entitled to recover it.¹¹ It is perfectly lawful for parties to substitute for their statutory obligation a contractual obligation.¹² A party entering into a contract in England is not excused from performance because such performance may be visiated with penalties under the law of the foreign country.¹³ But an English court will not enforce a contract the performance of which involves violation of the law of a friendly country.^{13a} The court would not refuse to enforce a contract (or decree) the object of which was actually performed in a country where it was legal.¹⁴ When the performance of a contract is rendered illegal by statute no suit would lie for breach of contract and the only compensation that can be claimed is that provided by the statute.¹⁵ A debt incurred by the major members of a Hindu joint family for the marriage of a minor member is not for an illegal purpose, because such a marriage is not illegal under the Child Marriage Restraint Act, 1929. This Act punishes those persons who arrange such a marriage but not the minor spouses who get married. It only seeks to restrain a marriage of minors but does not prohibit it. Hence the debt is binding on the joint family.¹⁶

Where a contract is to do a thing which cannot be performed without an infringement of the law it is void whether the parties knew the law or not. In order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance.¹⁷ An agreement to share profits which would contravene the terms of the licence as between the Forest Officer and the licensee is not hit by sec. 23.¹⁸ But such an agreement by a licensee under the Opium Act will be void under sec. 23 because sale of opinion is only permitted subject to such conditions as the Commissioner

9 *Boistub v. Wooma*, 16 C 436.

10 *Nanna v. Nathamuni*, 122 IC 342.

11 *Dadu v. Horilal*, 100 IC 345.

12 *Jyoti v. Haridas*, 32 C 1019 fold in *Naffer v. Jyoti*, 11 CWN 57, 60.

13 *Trinidad Shipping Co. v. Alston*, 1920 AC 888.

13a *Regazzani v. Sothia*, (1958) AC 301; *Foster v. Driscoll*, (1929) 1 KB 470.

14 *Chandalavada v. Chandalavada*, 1940 M 901.

15 *Wynn v. S. U. Ry.*, 5 Ex 420: 155 ER 183; *Re South of England Gas Co.*, (1911) 1 Ch 573.

16 *Parasram v. Naraini Devi*, AIR 1972 All 357.

17 *Waugh v. Morris*, LR 8 QB 202: (1861-73) All ER Rep 941; *Gaudet v. Brown*, LR 5 PC 134.

18 *Narasimha v. Babamiza*, 40 B 64; *Md. Syed Bada v. U. T. Truders*, AIR 1976 J&K 9.

may prescribe.¹⁹ Where the Cotton Control Order prohibits doing business in cotton except under a licence, a partnership between a licensee and a non-licensee will be void under sec. 23.²⁰

4. Illustrations.—By his statement of claim endorsed on the writ, the plaintiff claimed the repayment of the sum of £4,000 which he had paid to the defendant under an oral agreement made in London in consideration that the defendant should transfer and convey to him a flat outside the scheduled territories. Such transfer required the consent of the Treasury. It was held that the statement of claim disclosed that the plaintiff's action was founded on an agreement with the defendant under which the plaintiff had made a payment of £4,000 without the necessary Treasury consent and, as that payment was illegal, the plaintiff's action was founded on his own illegal act and, accordingly, the statement of claim would be struck out.¹

The respondent, a rubber grower, sold a quantity of smoked sheet rubber to a partnership of which the appellant was a member. Only one member of the partnership—not the appellant—held the requisite licence to purchase rubber. On a claim by the respondent for the balance of the price of the rubber (two of the partners, including the licence-holder, having submitted to judgment and a third being out of the jurisdiction) the appellant, who had never held a licence, contended that the licence was personal to the partner to whom it had been issued and did not cover the partnership, and that any purchase by him (the appellant) was prohibited by the Enactment and, therefore, illegal and unenforceable. It was held that the evidence was consistent only with a purchase by the partnership; that the licence was personal and not assignable, and the names of the partners not having been included in the licence as required by the Enactment the purchase was prohibited by law, a prohibition made in the public interest, which would be enforced notwithstanding that the appellant had to rely on his own illegality, and, accordingly, the respondent could not recover.²

By a clause in a charterparty it was provided: "Cargo to be loaded and stowed free of expense to the ship at the average rate of 400 tons per weather working day". The vessel in question, after its arrival in Calcutta, the port of loading, was ordered by the harbour master to move from its berth, because he thought that it could become a danger during the bore tides if it remained there. The vessel did not return to the berth until six days later, during which time loading was discontinued. On the question whether the time thus lost in loading was to be included in the assessment of lay time, it was held, *inter alia*, that, while non-compliance with the harbour master's order would have been a breach of the local law, illegality was no excuse for the failure to load unless it prevented the act of loading; it was not enough to point to a law, which prevented loading during a particular part of the lay time, and, therefore, the time lost was to be included in the assessment of lay time.³

19 *Raghunath v. Nathu*, 193-626.

20 *Budh Ram v. Dhuri Co-op. Socy.*, AIR 1972 Punj. 185, 187-88.

1 *Shaw v. Shaw*, (1965)1 WLR 537 CA (1965)1 All ER 638.

2 *Yin v. Sam*, (1982)2 WLR 765 PC.

3 *Compania Crystal etc. v. Herman & Mohatta (India) Ltd.*, (1958)3 WLR 36.

Even when a party to a contract performs his part of the contract illegally he is not necessarily debarred from claiming his dues. Thus, if under a contract of carriage P carries D's cargo in a vessel so overloaded as to infringe the provisions of the Merchant Shipping Act, 1932, against overloading and P is required to pay penalty for such overloading, P may not be prevented from claiming his due from D. In *St. John Shipping Corpn. v. J. Rank Ltd.*⁴ under similar circumstances the plaintiffs, owners of the vessel, were allowed to recover their dues from the owner of the cargo for the following reasons:

- (a) infringement of law by overloading was not contemplated by the contract.
- (b) the plaintiffs did not need to prove the illegal act, viz., overloading to recover freight.
- (c) the right to freight was not brought into existence by the crime of overloading.

If the purpose of an agreement be to evade the statutory prohibition of the transfer of occupancy land, the contract is void *ab initio*, no suit will lie to recover money paid under the unlawful agreement.⁵ Where the defendant agreed to help the plaintiff in bringing under cultivation land granted to the plaintiff by the Punjab Government and the plaintiff promised to give the defendant half of whatever right he acquired in the land, when several years later the plaintiff obtained full proprietary rights, the plaintiff was bound to give to the defendant a half share in those rights, though no title in the tenancy could be conferred, it being forbidden by government.⁶ A contract for the sale of sovereigns at market price is legal.⁷ *Pucca adat* contracts are not void.⁸ A lease to an unlicensed person for tapping toddy from trees is not illegal and money can be recovered from him under the lease.⁹ When a trader enters into a contract without obtaining the licence required by law the contract is not necessarily void. Thus where a trader enters into a contract for agency for the sale of medicines manufactured by a firm even before obtaining the wholesaler's licence under the Drugs Act, which he obtains subsequently, the contract is not void as there is nothing in the Drug Act to show that no agreement can be entered into for agency unless and until the person who gives the agency is satisfied that the agent holds the licence.¹⁰ A loan made for the purpose of enabling another person to settle differences in stock-jobbing transactions is illegal and all securities given for the repayment of the loan are void and the money cannot be recovered back.¹¹ A transfer of land without the sanction of the Deputy Commissioner in breach of the condition of grant may render the grant liable to resumption and the grantee to certain penalties, but such

4 (1956)3 WLR 870. See also *Archbolds v. Randall*, (1961)2 WLR 170 CA: (1961)1 All ER 417.

5 *Narsing v. Narayan*, 80 IC 949.

6 *Nathu v. Allah*, 64 IC 18.

7 *Bankelal v. Kanhaiya*, 77 IC 839, following *Shrinivasadas v. Ram*, 44 B 6.

8 *Jot Ram v. Jiwan*, 1932 L 638.

9 *Santhanarama v. Sami*, 61 IC 537.

10 *Southern Chemical Works v. Md. Hussain*, AIR 1970 Bom 128, 130.

11 *Cannan v. Bryce*, 3 B & Ald 179: (1814-23) All ER Rep 718.

transactions are not forbidden by law.¹² Where contrary to the provisions of a Police Act a constable bought land *benami* in the name of his mother in the district where he was serving, the transaction was void and no title to the land accrued to the constable or on his death to his son. The subsequent repeal of the Act did not affect the result.¹³ A *patwari* is not forbidden from figuring as a benamidar.¹⁴ A mortgage of occupancy holding being forbidden, such a mortgage is illegal and the deed cannot be enforced as a money bond.¹⁵ Relinquishment of ex-proprietary rights, not being forbidden, is binding.¹⁶ An agreement to sell land to a tenure holder having land more than the prescribed limit of twelve and half acres on the day when the agreement is executed does not defeat sec. 154 of the U.P. Zamindari Abolition and Land Reforms Act, 1951, which forbids transfer of land to a person whose total land after the transfer is likely to exceed 12½ acres. The agreement is not void under sec. 23 of the Contract Act, as an agreement to sell does not create any interest in land.^{16a}

Money paid as a bribe is not legally recoverable.¹⁷ A mortgage effected to pay off a loan contracted to pay a bribe to an officer is void.¹⁸ Money paid to a *darogah* to procure the release of a person from custody cannot be recovered by suit on failure of the *darogah* to procure the release, as the contract is illegal.¹⁹ An agreement to give property to a person in consideration of his giving false evidence is illegal.²⁰ An agreement on receiving a pecuniary consideration not to proceed with the charges in connection with a petition against the return of a member of Parliament is unlawful by the common law.¹ An agreement to postpone the registration of a deed with a view to reduce the assessment of land revenue is void.² Where there are certain restrictions against alienation by the grantee of the right to win earth oil, this section does not apply on a transfer without observance of the restrictions so as to make the transaction a forbidden one.³ An agent cannot recover the price of goods supplied to his principal which have been procured by illegal means.⁴

Under the Akbari Act (Madras Act 1 of 1886) there is a condition against subletting by the holder of a licence without the Collector's permission, a sub-lease without such permission is void, as "there was a legal obligation on the part of both the plaintiff and the defendant to obtain the Collector's permission

12 *Po v. Chetty*, 54 IC 42; *Hussain v. Jahan*, 18 IC 5.

13 *Sundrabai v. Manohar*, 35 Bom LR 404.

14 *Indar v. Ram*, 1944 N 325.

15 *Usman v. Sitara*, 33 ALJ 339.

16 *Raghunath v. Lachman*, 32 ALJ 1193; *Lal v. Hari*, 1942 O 1.

16a *Pahunchi Lal v. Man Singh*, AIR 1971 All 444, 446.

17 *U. San v. Hla*, 135 IC 553.

18 *Kashi v. Bapu*, 1940 N 305 FB.

19 *Protima v. Dukhia*, 9 BLR Appdx 38.

20 *Ko Pa v. Azimulla*, 1940 R 73.

1 *Coppock v. Bower*, 8 LJ Ex 9: 4 M&W 361.

2 *Chaganlal v. Kashiram*, 71 IC 38.

3 *Maung Ye v. M. A. S. Firm*, 6 Rang 423.

4 *Re Mather*, 3 Ves. 373: 30 ER 1060.

to the sub-letting".⁵ The reason is that "a contract by which a licensee lets the shop and the use of the licence for a fixed term, receiving rent, is contrary to the policy of the law and comes within the rule that a contract, which is illegal or is contrary to public policy, cannot be enforced".⁶ Accordingly, it has been deduced that no licensee under the Excise law can transfer the licence or sub-lease it to any person, as it would be defeating the policy of the law if such contracts were to be allowed.⁷ The infringement of such a condition has been held to render the contract void *ab initio* because "such a rule was made not merely for the protection of revenue, but also to regulate the liquor traffic in the interest of the public".⁸ Sale of a toddy shop *benami* in the name of another is void.⁹ Inasmuch as a penal law has to be strictly construed, an agreement entered into between the licensee and a third person, whereby in consideration of money contributed by the latter the former agrees to give certain benefits in the shape of profits, and also takes upon himself the liabilities arising from losses accruing from the said business, has been held not to amount to a transfer or sub-lease of the liquor contract¹⁰; in other words, it is not every partnership agreement relating to *abkari* business that will be illegal.¹¹ In *Rama v. Seetha*¹² it has been laid down that where a person, without the consent of the Government enters into a partnership contract with an *abkari* auction purchaser, he cannot sue to recover the advances made to the partnership, as the partnership is illegal. The partnership even where prohibited, being only *malum prohibitum*, can be sued by a third party in respect of a transaction, e.g., a loan, to which the partnership is a party. Of course such a stipulation will debar the licensee from taking a partner.¹³ An agreement in contravention of the prohibition of the sale of intoxicating liquor is invalid.¹⁴ Where the holder of a motor licence, instead of assigning it, which he could not do, entered into an agreement with the defendant to permit him to operate the vehicles in the plaintiff's name, the agreement being illegal, the plaintiff could not sue for the sum payable under it.¹⁵

Agreements to assign or sublet licences granted under the Excise law are void, but the same rule does not apply to agreements against under-letting

5 *Thithi v. Bheemudu*, 26 M 430; *Namasivaya v. Subramania*, 34 IC 927.

6 *Judoonath v. Nobin*, 21 WR 289; *Behari v. Jagodish*, 31 C 798.

7 *Debi Prasad v. Rup Ram*, 10 A 577, NWP Excise Act 1887; see *Raghunath v. Nathu*, 19 B 626, Opium Act 1878; *Ismalji v. Raghunath*, 33 B 636; *Rabiabibi v. Gangadhar*, 24 Bom LR 111, Bombay Salt Act, 1890.

8 *Marudamuthu v. Rangasami*, 24 M 401.

9 *Puvvada v. Attar*, 1949 M 252.

10 *Radhey Shyam v. Mewalal*, 51 A 506; see *Palepu v. Mallapudi*, 114 IC 655; *Nukala v. Immidisetty*, 117 IC 298 (fresh licence); *Merha v. Kundan*, 25 IC 146; but see *Hormasji v. Pestanji*, 12 B 422.

11 *Nanna v. Nathamuni*, 122 IC 342.

12 68 MLJ 570; *Vairava v. Pothi*, 165 IC 765; *Chennayya v. Jani*, 1944 M 415; *Velu v. Pillai*, 1950 M 444 FB.

13 *Brahmayya v. Ramiah*, 43 M 141 creditor not allowed to recover the whole sum advanced, see *Khoday v. Swaminadha*, 92 IC 112; *Satyala v. Bhoga*, 1935 M 895.

14 *Sugnomal v. Moosa*, 1943 S. 219.

15 *Nash v. Stevenson*, (1935) 2 KB 341.

entered into with a public department.¹⁶ Where a person holding a licence for carrying on the business of buying and selling ginned cotton under the Cotton Control Order, 1955 is not prohibited either by the Cotton Control Order or any other law from entering into partnership with a non-licence holder to carry on that business his partnership with a non-licence holder will not be hit by sec. 28.¹⁷

Farming out by a municipality of its right to collect fees on the slaughter of animals is unauthorised and *ultra vires*. The contract is void *ab initio* and therefore any sum due to the municipality under such a contract cannot be recovered.¹⁸ Where a copyright in a picture did not extend to India, a contract to prepare and supply to the plaintiff certain copies of the picture is not void and the plaintiff is entitled to damages for the breach of the contract.¹⁹ A contract for sale of land to a Buddhist monk is not void.²⁰ There is nothing unlawful or against public policy in allowing a Mahomedan by a compromise to carve out of land a life estate for one person and to give a vested remainder to another.¹ An assignment by a puisne judge of the sum "equal to the amount of six months' salary", directed to be paid by 6-Geo 4 c. 85 in case of his death while in office to his personal representative, is a valid assignment.² An agreement by a Hindu to dedicate immovable property to a mosque cannot be enforced.³

A member of the English Bar enrolled as an advocate in this country is under no disability to sue his client for professional services done by acting and pleading for him. The rule of English law is not in force in this country. On the contrary, an express agreement or a tacit understanding that a Barrister advocate will not sue for his fees is void under S. 28. It follows that if such an advocate be negligent in the conduct of his duties, the client has a legal remedy against him.⁴

5. Defeat the provisions of any law.—The question has been raised whether the word 'law' refers only to substantive law or also to adjective law such as the Civil Procedure Code,⁵ and it has been said that in clause (1) the word means 'law' as enacted by a competent legislature, but in clause (2) it means personal or customary law.⁶ The term 'law' includes an order by a competent authority having the force of law. Hence, where any agreement is forbidden by an order of the Magistrate, it shall be an agreement forbidden

16 *Gangadhar v. Damodar*, 21 B 522.

17 *Dhuri Co-op. Soc. v. Budh Ram*, AIR 1971 Punj 134, 138.

18 *Municipal Council v. Abbaho*, 36 M 113.

19 *Vasudeo v. Anupram*, 44 B 720.

20 *U. Pinnya v. Law*, 121 IC 705 FB.

1 *Fayazul v. Muhammad*, 2, IC 865.

2 *Arbuthnot v. Norton*, 3 MIA 435.

3 *Fazle v. Anath*, 11 IC 436.

4 *Nihal v. Dilawar*, 55 A 570 FB overruling *Alston v. Pitambar*, 25 A 509.

5 *Hukumchand v. Thorunnessa*, 16 C 504.

6 *A. R. Firm v. Po*, 1939 R 305 FB.

by law.⁷ A transfer for consideration with a view to defeat creditors is voidable, as such is not covered by this section.⁸ An agreement to indemnify the doer of an illegal act is void.⁹ No court will enforce an agreement which, if carried into execution, the parties would be compelled under the process of a court of justice to do that which is criminal.¹⁰ Parties cannot contract out of the provisions of an Act.¹¹ If a provision is enacted for the benefit of a person or class of persons, he is not precluded from contracting to waive the benefit, provided that no question of public policy is involved. In *Lachoo Mal v. Radhey Shyam*¹² the Supreme Court held that it was open to the landlord to waive the benefit of a provision enacted for the benefit of the landlord under the Rent Control Act. And in *Murlidhar v. State of U.P.*¹³ the Supreme Court has held that the tenant is not precluded from claiming protection under the Rent Control Act in spite of waiver, because such protection involves a question of public policy, namely, protection of tenants against oppression by landlords.

6. Illustrations.—An agreement to pay a tax prohibited by the Government is void.¹⁴ An assignment of a lease of tolls contrary to the terms of the lease would not offend against the provisions of the law.¹⁵ An agreement to indemnify a bail is an illegal contract;¹⁶ therefore, on forfeiture of a bail bond a contract to indemnify the surety against loss cannot be enforced,¹⁷ the reason being that the person giving bail should be interested in looking after, and if necessary, exercising the legal powers he has to prevent the accused from disappearing.¹⁸ A person who deposited a sum of money by way of security with his surety is not entitled to recover it as the deposit defeats the object of the law.¹⁹ A promissory note executed in consideration of giving evidence is unenforceable. If, however, the object and consideration be found to be legal, the transaction cannot be avoided simply because the promisee happens to know the reason for which the promisor had signed the note, namely, to give evidence in favour of the promisor.²⁰ The illegality of the constitution of a firm does not *per se* afford any answer to a demand against it arising out of a transaction,

7 *Abdul Hameed v. Mohd. Ishaq*, AIR 1975 All 166 (FB).

8 *Parashram v. Sadasheo*, 1936 N 268.

9 *Yega v. Vankama*, 135 IC 710.

10 *Wood v. Griffith*, 1 Sw 43, 55: (1814-23) All ER Rep 294.

11 *Day v. Davies*, (1938) 2 KB 74.

12 AIR 1971 SC 2213.

13 AIR 1974 SC 1924. This case overrules the view taken by the Allahabad High Court in *Sri Tej Chaddha v. Sideshwari*, AIR 1973 All 324 that a tenant can give up the protection given to him.

14 *Gosvami v. Robb*, 8 B 398.

15 *Bhagwant v. Ganga*, 1940 B 369.

16 *King v. Porter*, (1910) 1 KB 369; 79 LJ KB 241: (1908-10) All ER Rep 78.

17 *Prosonno v. Prakash*, 28 IC 560; *Bhupati v. Golam*, 56 IC 539; *Herman v. Jeuchner*, 15 QBD 561: 54 LJ QB 340.

18 *Consolidated & v. Musgrave*, (1910) 1 Ch 37.

19 *Fateh Singh v. Sanwal*, 1 A 751; but see *Bur v. Kehru*, 1938 L 732.

20 *Sahabuddin v. Tata*, 182 IC 966.

legal in itself, to which it is a party.¹ There is nothing illegal in a contract by a mortgagor to indemnify the mortgagee against any claimant in respect of the mortgaged property.² An agreement by which the creditor was to have a lien on half of certain funds, but in case of the debtor being declared insolvent was to have a lien over the whole, is void as being a fraud upon the insolvency law.³ There cannot be a valid contract that a man's property shall remain his until his bankruptcy and, on the happening of that event, shall be taken away from his creditors.⁴ A contract to give the mortgagee an additional advantage over the other creditors in the event of the bankruptcy of the mortgagor is void.⁵ On insolvency of a debtor a stipulation by a creditor with the debtor securing an advantage to himself is void as being a fraud upon the creditor and money paid under any such agreement may be recovered.⁶ Where the object of an assignment is to defeat the provisions of the insolvency law by preventing the property of the insolvent from being vested in the official assignee, the assignment is void.⁷ A composition between a debtor and his creditors is rendered void if by a secret arrangement some creditors have an advantage over others.⁸ The creditors to whom preference is shown cannot recover even their shares under the composition scheme,⁹ and the other creditors are not bound by the composition deed.¹⁰ It is immaterial that the undue preference of a creditor is shown in consideration of his becoming surety for the payment of the composition.¹¹ If, however, such an agreement was not secret or collusive but was assented to by creditors, it is binding.¹² An agreement by a creditor, on recovering his money, to withdraw his opposition to the discharge of the insolvent, is illegal.¹³ An assignment of a *hatchita* made after the insolvency of the debtor and without consideration is void.¹⁴ Debt existing prior to insolvency is not good consideration for a promissory note executed after discharge. Help rendered by the creditor after discharge of the debtor does not amount to a real and fresh consideration.¹⁵ But where a creditor of an

1 *Appa v. Ramkrishna*, 53 B 652; *Brahmayya v. Ramiah*, 43 M 141; *Budhram v. Dhuri Co-op. Soc.* AIR 1972 Punj. 185.

2 *Udaya v. Subramania*, 6 MLJ 266.

3 *Re Jeavons*, LR 8 Ch 643; *Blacklock v. Dobie*, 1 CPD 265; *Re Barrow*, 18 Ch D 464.

4 *Re Harrison*, 14 Ch D 19.

5 *Re Thompson*, 7 Ch D 138.

6 *Mc Kewan v. Sanderson*, LR 20 Eq. 65, 72; *Naoroji v. Sidick*, 20 B 636, 646; *Krishnappa v. Adimula*, 20 M 84, *refd. to in Jamal v. Parameshwara*, 16 MLJ 418; *Atkinson v. Denby*, 7 H&N 934.

7 *Jaffer Ali v. Budge Budge Jute Mills*, 34 C 289.

8 *Daughlish v. Tennent*, LR 2 QB 49; *Staines v. Wainwright*, 9 LJ CP 107; *Worrell v. Johns*, 1928 Ch 737; (1928) All ER Rep 662. *Mallalieu v. Hodgson*, 20 LJQB 339, 347; *Atumal v. Dip*, 1939 S. 33.

9 *Wilson v. Ray*, 8 LJQB 224; *Howden v. Haigh*, 9 LJQB 198.

10 *Re Milner*, 15 QBD 605.

11 *Wood v. Barker*, LR 1 Eq 139.

12 *Bissel v. Jones*, LR 4 QB 49.

13 *Hall v. Dyson*, 21 LJQB 224; 17 QB 785.

14 *Chinnirram v. Shibendra*, 40 IA 24.

15 *Sudhendu v. Khatish*, 163 IC 858; *Bateman v. Crook*, 4 Ex D 26 *distgd.*

insolvent debtor, waiving his claim to the sum due from the Official Assignee as a creditor in the insolvency, lent a fresh sum in consideration of the debtor and his surety promising to pay to the creditor the new as well as the old debt, the agreement was held enforceable against the surety.¹⁶ Where the Official Assignee was supplied with funds by certain creditors for the costs of his suit on condition that out of the sum recovered in that suit their debt would be paid in full first and the balance distributed among the other creditors, the agreement was void as being contrary to public policy.¹⁷ An antenuptial marriage settlement will be void if it be in fraud of creditors.¹⁸ A loan for the repayment of an earlier loan tainted in part with illegality to the knowledge of the creditor is irrecoverable.¹⁹

A mortgage by a person holding a certificate of administration in respect of the estate of a minor is void as it contravenes the provisions of Act 40 of 1858.²⁰ A mortgage entered into by a disqualified proprietor under Act 16 of 1882 is a contract entered into for an unlawful consideration and consequently void.¹ A mortgage executed by one agriculturist on taking the lands of another, undertaking in exchange to pay off debts due under another mortgage to a non-agriculturist, is binding on the minor son of a debtor on his death.² A charge created by a Mahomedan on the property of one of his heirs is illegal.³ Where the object of the parties to a lease was to defeat the provisions of the Calcutta Rent Act, 1920, the lease was held to be void.⁴ Sale or mortgage of occupancy rights by occupancy tenants is invalid.⁵ The contrary view has also found support in certain cases.⁶ A sale of land in contravention of the Alienation of Land Act (13 of 1900) is void.⁷ A mortgage of property under attachment is unlawful.⁸ A bond executed to redeem the mortgage of a tenancy land is enforceable.⁹ An agreement for the sale of *karnam* service lands forbidden by sec. 6 of the Transfer of Property Act is void and the plaintiff is entitled to a refund of the money advanced by him.¹⁰ Sec. 136 of that Act forbids dealings in an actionable claim by certain persons. Such agreements are, therefore, void.¹¹

16 *Hashim v. Chotalal*, 1938 Rang 19.

17 *Re Purushothamdoss*, 55 MLJ 657.

18 *Pogose v. D. & L. Banking Co.*, 10 C 951.

19 *Spector v. Agada*, (1971)3 All ER 417 Ch D.

20 *Chimman v. Subram*, 2 A 902.

1 *Radha v. Kamod*, 30 A 38.

2 *Dillu v. Ram*, 1937 L 696.

3 *Maltub v. Kalawati*, 1933 A 934.

4 *Saleh Abraham v. Manekji*, 50 C 491.

5 *Jhinguri v. Durga*, 7 A 878; *Kashi v. Kedar*, 20 A 219 FB; *Prag v. Sital*, 36 A 155; *Moti v. Ikramullah*, 39 A 173 PC; *Mohammad v. Madad*, 132 IC 543; *Makund v. Sunita*, 132 IC 422.

6 *Gauri v. Bandhu*, 119 IC 505; *Shaligram v. Narain*, 45 IC 669.

7 *Sada v. Hayat*, 109 IC 633; but see *Inder v. Dyal*, 72 IC 1032.

8 *Nathu v. Ganga*, 63 IC 108.

9 *Jagannath v. Baijnath*, C937 O. 150.

10 *Aaryaprabhakara v. Gummudu*, 48 MLJ 598, the alienation cannot be validated by ratification, *Salu v. Bajat*, 42 IC 200.

11 *Sitla v. Mahabir*, 162 IC 229.

An agreement by a debtor not to raise the plea of limitation, should a suit have to be filed, is void as tending to limit the provisions of the Limitation Act.¹² Any contract by which a party precludes itself from exercising its statutory power is bad.¹³ Even an agreement to enlarge the period of limitation is bad.¹⁴ A contract to pay money upon the consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant cannot be enforced.¹⁵ No rent can be recovered under a lease executed for carrying on an illegal trade. Evidence *dehors* the lease is admissible to show the illegal purpose.¹⁶ The effect of a temporary injunction granted under O. 39 r. 1, C. P. C., is not to make a subsequent alienation of the property illegal and void.¹⁷ A regulation of the Sonthal Parganas provides that compound interest will not be decreed by any Court. This does not make a promise to pay compound interest unlawful.¹⁸ At the time when a promissory note was executed by a person his estate was under the management of the Court of Wards, so the contract evidenced by the note was void. After the release of the estate and the death of the borrower his son executed a bond for Rs. 3,000, a part of the consideration was the sum previously borrowed by his father, the consideration was not unlawful.¹⁹ A compromise of a suit, whereby one party agrees to a mortgage decree being passed even in respect of the portion of the claim not secured by the mortgage, is not illegal.²⁰ Where a deed of compromise is not a deed of gift or conveyance but is in the nature of a contract and a family arrangement, which is specially favoured in courts of equity, a partial restriction against alienation is not void for repugnancy.¹

A promise to pay a sum of money in consideration of an agreement to give or take a boy in adoption is invalid.² An adoption will not be declared invalid by reason of any collateral arrangement entered into between the adopter and adopter's natural father. What the law refuses to recognise is the contract or agreement whereby third persons who are not parties to the transaction try to acquire a monetary benefit by promoting it.³ Thus a promise to pay a sum to the *guru* of a widow in consideration of his inducing her to adopt a son of the donor is not enforceable.⁴ It has been pointed out that there is some

12 *Ramamurthi v. Gopayya*, 40 M 701.

13 *Re. S. E. Ry.*, (1907) 2 Ch 366 foling, *Ayr Harbour Trustees v. Oswald*, 8 AC 623.

14 *Krishna v. Hiru*, 11 BLRFB 101.

15 *Chetti v. Chetti*, 4 Mad HCR 7.

16 *Gas Light Co. v. Turner*, 9 LJ Ex 336: 133 ER 127 Exch, similarly if the object be to create a nuisance, *Flight v. Clarke*, 13 LJ Ex 309.

17 *Delhi & London Bank v. Ram*, 9 A 497, fold in *Manohar v. Ram*, 25 A 431.

18 *Shama v. Chuni*, 26 C 238.

19 *Bindeshri v. Sarju*, 73 IC 458.

20 *Bhuvanagiri v. Maradugula*, 17 M LJ 200.

1 *Mohammad v. Abbas*, 55 CLJ 510 PC.

2 *Narayan v. Gopalrao*, 24 Bom LR 714; *Eshan v. Haris*, 18 BLR appendix 42; *Shri Sitaram v. Shri Harihar*, 35 B 169, 179. •

3 *Subbaraju v. Narayanaraju*, 51 MLJ 366, 370.

4 *Ramchand v. Audaito*, 10 C 1054; *Bakshi v. Nadu*, 1 CLJ 261, see cases refd to; *Jwona v. Malak*, 53 IC 407.

divergence of judicial opinion on the general question whether ante-adoption agreements, entered into by the natural father of an adopted son and operating in restriction of his legal rights as an adopted son, are binding on him. The Privy Council has expressed a leaning against the binding nature of these agreements.⁵ A Full Bench of the Madras High Court,⁶ however, has held that an agreement with the adoptive mother by which the natural father agreed before adoption that in case of any difference she should enjoy half the estate of her husband for life is valid and binding; the real test in these cases is whether the agreement is fair and reasonable. But an alienation by a Hindu widow of a portion of her husband's estate with the consent of the natural father of the child taken in adoption has been held not binding on the adopted son.⁷ An adoptive father has been held entitled to restrict the rights of the adopted son⁸ by making reasonable arrangements for the enjoyment of the property by his widow during her life-time.⁹ An agreement by the father or the mother to deprive himself or herself of the custody of his or her children is not binding.¹⁰

It is contrary to the policy of law to allow persons by a contract between themselves to avoid a marriage on the happening of any event they may think fit to fix upon, *e.g.*, if the husband does not continue to live in the wife's village.¹¹ An agreement on the part of the husband that he will not be at liberty to remove his wife from her parent's abode is invalid.¹² But an agreement made subsequent to the marriage that the wife may leave her husband's house on ill-treatment is valid.¹³ An agreement by the wife to suspend the operation of her maintenance decree for one year is valid.¹⁴ An agreement contemporaneous with marriage whereby the husband promises to pay the wife maintenance in case of strained relations is not void.¹⁵ A deed of separation providing for the disposition of property in the event of separation in future is valid.¹⁶ According to Mahomedan law it is not competent to parties contracting a marriage to enter into a separation deed by which the husband consents that his wife may live with her parents.¹⁷ An agreement for immediate reunion coupled with a provision for subsequent separation is clearly bad

5 *Bhasba v. Indar*, 16 C 556; *Venkata v. Court of Wards*, 3 CWN 415 PC.

6 *Visalakshi v. Sivaramien*, 27 M 577.

7 *Vysacharya v. Venkubai*, 37 B 251.

8 *Bepin v. Brojonath*, 8 C 357.

9 *Panchanon v. Benoy*, 27 CLJ 274; *Krishnamurti v. K.*, 50 M 508 PC.

10 *Re Andrews*, LR 8 QB 153; *Humphrys v. Polam*, (1901)2 KB 385; 70 LJ KB 752.

11 *Sitaram v. Aheeree*, 11 BLR 129, 134.

12 *Monmohini v. Basanta*, 28 C 751; see *Govind v. Radha*, 15 CWN 205, 209.

13 *Sabed v. Bilatunnessa*, 30 CLJ 510.

14 *Vemuru v. Vemuru*, 1944 M 17.

15 *Jamila v. Abdul*, 1939 L 165.

16 *Wilson v. Wilson*, 5 HLC 40, 1 Wh. & TLC 506; see *Hunt v. Hunt*, 4 DGF & J 221 (voluntary separations are lawful); *Jamila v. Abdul*, 184 IC 105.

17 *Abdul v. Husseni*, 6 Bom LR 728; similar case under Hindu Law see *Parshotam v. Jodi*, 2 Bom LR 72.

under English law as also under Mahomedan law.¹⁸ But an agreement executed before marriage in order to restrain the prospective husband from ill-treating his wife, or behaving improperly towards her, or capriciously turning her out, is valid.¹⁹ An agreement entered into before marriage under which the wife consented to marry on condition that under certain specific contingencies, all of a reasonable nature, her future husband would permit her to divorce herself under the form prescribed by Mahomedan law is valid.²⁰ An agreement of desertion by the wife on the second marriage of her husband is opposed to Mahomedan law and void.¹ Where a creditor knows that the object of his debtor in taking the loan advanced by him is to utilise the money for payment of compensation to a husband who is willing to divorce his wife, in case his marriage expenses are paid back to him, the creditor is not disentitled from recovering it by suit from his debtor.² Where a person made a promise to marry a married woman and the latter, on obtaining a divorce, had a day fixed for the marriage, this was a fresh promise so it was binding.³ A promise made by a married man to a woman, who knew of his marriage, of marrying her if he obtains a decree of nullity of marriage, is void. A married man is incapable of legally contracting to marry, so he cannot sue for breach of promise to marry.⁴ A promise made by one spouse after decree *nisi* has been pronounced to marry a third party after the decree has been made absolute is valid.⁵

A promise to pay the salary of a receiver without leave of Court is not binding on the promisor, as the court alone is to determine what fee or commission a receiver is entitled to by way of remuneration.⁶ As a general rule an executor or administrator is entitled to no allowance for personal trouble and loss of time in the execution of his duties, but an agreement by which a third person undertakes to pay him a remuneration in consideration of his undertaking to accept is not unlawful.⁷ An agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful.⁸ The terms of a private compromise that might have been arrived at between the executor and objector cannot be introduced into the probate.⁹ A bargain for the withdrawal of a caveat, if

18 *Bai Fatma v. Ali*, 37 B 280.

19 *Muhammad v. Jamal*, 43 A 650 fold in *Muhammad v. Fatima*, 119 IC 486.

20 *Hamidoolla v. Faizunnissa*, 8 C 327, fold in *Ayatunnessa v. Karam Ali*, 36 23; *Babu v. Badarannessa*, 29 CLJ 230; *Muhammad v. Mumtaz*, 161 IC 701, per contra *Bai Fatma v. Ali Mahomed*, 37 B 280.

1 *Mahmud v. Fatima*, 160 IC 365.

2 *Nayan v. Laxman*, 80 IC 885.

3 *Skipp v. Kelly*, 50 MLJ 498 PC.

4 *Wilson v. Carnley*, (1908)1 KB 729; (1908-10) All ER Rep 120; *Siveyer v. Allison*, (1935)2 KB 403; 104 LJ KB 597.

5 *Fender v. Mildmay*, 1938 AC 1; (1973)3 All ER 402.

6 *Prakash v. Adlam*, 30 C 696; *Davies v. Elmsie*, (1938)1 KB 337.

7 *Narayan v. Shajani*, 22 C 14.

8 *Monmohini v. Banga*, 31 C 357.

9 *Bishuanath v. Sarju*, 53 A 1000.

fairly made, is not contrary to public policy.¹⁰ An agreement whereby the debtor obtained the release of his property from attachment in execution of a decree which was silent as to future interest on condition of paying by instalments the amount claimed with interest thereon is not void.¹¹ Where a legal practitioner bases his claim for remuneration on an agreement infringing the Legal Practitioners Act, which is therefore not enforceable, he is not entitled to recover reasonable fees for the work done.¹² An agreement between members of a family not to come to a partition may be binding upon themselves¹³ but not on the heirs.¹⁴ An agreement by a reversioner to sell his interest when it shall fall due on him is void.¹⁵ In the absence of a statutory bar positively prohibiting a legal practitioner from being engaged in trade or business, a loan on mortgage is valid and enforceable.¹⁶ A promise by a judgment-debtor to pay a larger rate of interest in consideration of the decree-holder agreeing to give the debtor further time for the payment of the decretal amount than is allowed by the decree is not void.¹⁷ A promissory note payable to 'A or order or bearer' contravenes the provisions of the Paper Currency Act.¹⁸ An agreement between a tenant and a landlord that the former will not make any improvement without the consent of the latter and that if he makes any such improvement he will not be entitled to any compensation at the time of ejectment is contrary to law and therefore void.¹⁹ An agreement to pay a certain rent for a certain area of land, but if on measurement the land be found to be more than the stipulated area, the tenant would pay rent for the whole area at an enhanced rate, is void as infringing S. 29 of the Bengal Tenancy Act.²⁰ Where any law prescribes a maximum area of agricultural land that an agriculturist may hold, and a contract to buy land by an agriculturist is likely to put him in possession of land in excess of the prescribed ceiling, the contract does not necessarily defeat the provisions of the said law. If the law simply says that the acquisition in excess is void and that the land in excess shall not revert to the transferor but shall vest in the Government the contract to buy cannot be said to be void under sec. 23.¹

Where a rule of Provident Fund Rules provides that on the adjudication of the subscriber as an insolvent, the amount standing to his credit in the Fund shall be liable to be forfeited to it, such condition or agreement is invalid. A man may give (in India only by will) property or its income to a donee with a condition that the donee's interest will cease on bankruptcy

10 *Pashupati v. Shital*, 133 IC 327.

11 *Seth Gokul v. Murli*, 3 C 602.

12 *Kamakhyia v. Kalyan*, 101 IC 559.

13 *Krishnendra v. Debendra*, 12 CWN 793.

14 *Abu v. Kaniz*, 2 ALJ 652.

15 *Mahadeo v. Mathura*, 29 ALJ 295.

16 *Gopal v. Babu*, 107 IC 903.

17 *Hukumchand v. Tharunness*, 16 C 504.

18 *Hidayat v. Nga*, 24 IC 721.

19 *Bhola v. Mohammad*, 10 IC 465.

20 *Sadananda v. Basudeb*, 57 CLJ 202.

1 *Satappa v. Appayya*, AIR 1968 SC 1858.

and the property will in that event go to another; if insolvency supervenes, the property will not vest in the Official Receiver. If there is no gift over on the cesser of the donee's interest, the property will revert to the donee and will vest in the Official Receiver on the donee's insolvency. But a person cannot enter into any arrangement or agreement by which his own title will cease in the event of bankruptcy, for it would then be a fraud perpetrated on the Insolvency law.²

Section 23 speaks of three matters, *viz.*, consideration for the agreement, object of the agreement and the agreement. The words "if permitted, it would defeat the provisions of any law" occurring in the third paragraph of the section should be understood as referring to performance of an agreement which necessarily entails the transgression of the provisions of any law. A bare possibility of such transgression, if there be also a possibility of performance without such transgression, does not invalidate the agreement.³

A clause in an air ticket completely exempting the carrier by air from liability on account of negligence etc. of the carrier or of the pilot or of the staff is not hit by sec. 23 of the Contract Act, because the liability of such carrier in India is not governed by the Indian Contract Act. Hence if any passenger is killed in a plane crash no compensation can be claimed when the air ticket contains such an exemption clause.⁴

7. **Fraudulent.**—Money put into the hands of a company to give it a fictitious credit is a fraud and cannot be recovered.⁵ An agreement to cheat the public by leading them to believe that certain shares had a value, which the plaintiffs and the defendants knew they had not, is illegal.⁶ Where money is paid for the purpose of defrauding the intended shareholders, by holding out to them the assurance of an exclusive right to use a certain process as an inducement to them to contribute their money, when it was known to the parties that no such exclusive right existed, the plaintiff cannot maintain an action to recover back the money on the well established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back.⁷ Where a railway company refuses to enter into a contract with a particular person, an agreement with another person to secure in his name the contract is fraudulent and void.⁸ A contract fraudulent against a third party may yet be binding as between the parties.⁹ Where a bond contains a stipulation that no credit will be given for any payment not endorsed on the bond, evidence of payment will yet be admissible.¹⁰ Where no valid transfer can

2 *Muktilal v. Trustees of P. F.*, AIR 1956 SC 336.

3 *Neminath v. Jamboorao*, AIR 1966 Mysore 154. See also *Waugh v. Morris*, (1873) 8 QB 202; (1861-73) All ER Rep 941; *St. John Shipping Corporation v. Joseph Rank Ltd.*, (1957) 1 QB 267; (1956) 3 All ER 683.

4 *Indian Airlines Corporation v. Madhuri Chowdhuri*, AIR 1956 Cal 252.

5 *Re. G. B. Steamboat Co.*, 26 Ch D 616.

6 *Scott v. Brown*, (1892) 2 QB 724; (1891-94) All ER Rep 654.

7 *Begbie v. Phosphate Sewage*, LR 10 QB 491 *affid.* on app. 1 QBD 679; 35 LT 350; 25 WR 85 CA.

8 *Mani Ram v. Purshotam*, 52 A 1001; *Saheb v. Nagar*, 68 PR 1884.

9 *Shaw v. Jeffery*, 13 Moo, PC 432.

be made of a tenancy without the consent of the Financial Commissioner, and such consent has not been obtained, a contract by the grantee to share, if he succeeded in getting the land, in the cultivation of the tenancy, is not void on the ground of fraud.¹¹

8. **Injury to person or property of another.**—An agreement which binds down the executant to daily attendance and manual labour until a certain sum is repaid is indistinguishable from slavery. Such a contract is opposed to public policy and is not enforceable.¹² A mortgage contract is not illegal within the meaning of the section merely because the mortgagors were entitled only to a half share and not to the whole of the property mortgaged.¹³

9. **Immoral.**—A promissory note executed for the repayment of the balance of the security deposit for the lease of a house taken for immoral purposes is not enforceable.¹⁴ A suit would not lie for recovery of rent against a lessee where the house has been let out for the purpose for a brothel,¹⁵ or to the kept mistress of a certain man.¹⁶ Similarly a man who knowingly lets out quarters to a prostitute to carry on prostitution cannot recover the rent in a court of law¹⁷; so also a man who knowingly sells articles to her for the same purpose cannot recover the price thereof.¹⁸ It is settled law that any person who contributes to the performance of an illegal contract, by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing as supplied. Nor can any distinction be made between an illegal and an immoral purpose.¹⁹ But a decree for mesne profits has been made where a tenancy for an immoral purpose (brothel) has been determined and the landlord's object was not to let out the house for the same purpose.²⁰ No contributor to an immoral work can recover compensation for his labour, even the printer cannot recover his costs.¹ A contract of loan of the services of a dancing and singing girl is not immoral.² A suit by the adopted daughter of a dancing girl for an account or for a share in the profits of their immoral partnership is not maintainable.³ There is nothing immoral in agreeing to pay a commission to an agent for helping in procuring a heavy loan.⁴ But a promise by the purchaser to pay a commission to the vendor's

10 *Sultan v. Mugata*, 3 MLJ 10.

11 *Hussain v. Jahan*, 18 IC 5.

12 *Ram Surup v. Bansi*, 42 C 742 fold in *Satish v. Kashi*, 46 IC 418; see *Kuruppannam v. Pambayan*, 101 IC 39; *Anandiram v. Goza Kachori*, 27 CLJ 459.

13 *Jogo Mohan v. Dandoong*, 12 CWN 94.

14 *Kali v. Manmohinee*, 63 C 445.

15 *Bani Muncharam v. Regina*, 32 B 581, 589, see English authorities cited.

16 *Upfill v. Wright*, (1911)1 KB 506: 80 LJ KB 254.

17 *Chogalal v. Pyari*, 31 A 58; *Gauri v. Madhumani*, 9 BLR Apdx. 37.

18 *Hamilton v. Grainger*, 157 ER 1092: 5 H & N 40; *Pearce v. Brooks*, LR 1 Ex 218: (1861-73) All ER Rep 102.

19 *Upfill v. Wright*, (1911)1 KB 506: 80 LJ KB 254.

20 *Mariam v. Mungi*, 113 IC 366, no authority cited.

1 *Peplott v. Stockdale*, Ry. & M 337; Halsbury, 4th ed., Vol 9 Paras 408, 409.

2 *Samir v. Ali*, 47 IC 138.

3 *Ganga v. Cuddapah*, 1939 M 139.

4 *Abdul v. Raghunath*, 130 IC 531.

agent for the sale of a plot of land at less than the market price is not enforceable.⁵ Money lent for the purpose of assisting a person to visit brothels cannot be recovered.⁶ An agreement to pay *dostoori* is unlawful being immoral.⁷

A promise to pay a monthly allowance to a woman kept as a mistress is not based on immoral consideration.⁸ As against it, it has been laid down that if a creditor were to advance money to a borrower to be applied for an immoral purpose, namely, with a view to the continuance of cohabitation with a dancing girl, the money cannot be recovered.⁹ The promise or expectation of future illicit cohabitation is an unlawful consideration and an agreement founded on it is void,¹⁰ and a bond executed in consideration of future adulterous cohabitation cannot be enforced.¹¹ In English law a promise made in consideration of past illicit cohabitation is void, for want of consideration, unless made in the form of a bond or covenant under seal.¹² Such a promise in this country has been held to be enforceable under S. 25(2).¹³ Past cohabitation may be the motive for a gift but not its object or consideration.¹⁴ Where a deed of gift is executed in favour of a mistress with the motive of recompensing her for past co-habitation as well as other services the object of the gift cannot be held to be illegal.¹⁵ Where in consideration of certain advances made by a person to a woman she promises to marry him after obtaining a divorce from her husband, the promise is void and the money paid cannot be recovered.¹⁶ On the same ground, a promise made by a married man during the life-time of his wife to marry some other woman is void.¹⁷ The repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced, but singing is not necessarily acquired by the community of Naikins in Nasik with a view to practising prostitution. A bond executed by the father of a Naikin girl for a loan in order to teach her singing is not void.¹⁸

5 *Manikka v. Peria*, 70 MLJ 724, see illust. (j).

6 *Rajendra v. Abdul*, 39 IC 767.

7 *Madho v. Badruddin*, 8 IC 317.

8 *Krishna v. Shiwarji*, 89 IC 573; *Godfrey v. Parbati*, 17 Pat 308.

9 *Pannichand v. Nanoo*, 18 MLJ 456. In *Man Kuar v. Jasoda*, 1 A 478, case before the Contract Act, annuity by deed given to a concubine was held not void; but see *Sabava v. Yamanappa*, 1933 B 209.

10 *Thasi v. Shunmugavelu*, 28 M 413; *Chandrakali v. Shabhu*, 153 IC 333; *Benyon v. Nettleford*, 20 LJ Ch 186; *Walker v. Perkins*, 3 Burr 1568. Query, whether the right to set aside the deed of gift survives to the heirs of the promisor, *Ghumna v. Ram*, 88 IC 411.

11 *Kandaswami v. Narayanaswami*, 45 MLJ 551.

12 *Waugh v. Morris*, LR 8 QB 202, 207: (1861-73) All ER Rep 941.

13 *Mankuar v. Jashoda*, 1 A 478; *Dhiraj v. Bikramojit*, 2 A 787; see *Lakshminarayana v. Subhadri*, 13 MLJ 7; *Mahtabunnissa v. Rifaquat*, 85 IC 459; *Chandrakali v. Shambhu*, 153 IC 333; *Kothanda v. Dhana*, 1943 M 253.

14 *Istak v. Ranchod*, 1947 B 198.

15 *Naraini v. P. Mohan*, AIR 1972 Raj 25, 30.

16 *Bai Vijli v. Nansa*, 10 B 152.

17 *Spiers v. Hunt*, (1908)1 KB 720: 77 LJ KB 321.

18 *Khub Chand v. Beram*, 13 B. 150.

10. Public Policy.—Public policy does not admit of definition and is not easily explained. It is a variable quantity and must vary with the habits, capacities, opportunities¹⁹ and economic conditions²⁰ of the people. It has been stated to be “a very unruly horse”,¹ so it is necessary to ride it warily. Parties, it is true, cannot contract themselves out of a statute, that is against public policy, but that principle does not apply “unless the case were clearly brought within the principle of the decisions as to the contracts which are against public policy”.² A transaction, to be void as being against public policy, must be found, as a fact, in its inception to amount to or involve an illegality, or be of such a nature that, if permitted, it will defeat the provisions of the law.³ If a contract be made contrary to public policy, performance cannot be enforced either at law or in equity. Thus, where there was a policy of insurance on the life of A under which the policy money was payable to B, and B murdered A, B could not recover under the policy, but the insurance money might form part of the estate of the insured, and as between his legal representative and his insurers no question as to public policy can arise.⁴ Intentional suicide will prevent the representative of the assured from recovering the policy money.⁵ A third party policy of insurance against accidents caused by negligence, even though gross and attended by criminal consequences, is not void as against public policy.⁶ A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. It is contrary to public policy that a person should be hired for money or valuable consideration, because he has access to persons of influence and can use that position and interest to procure a benefit for the hirer from the Government, so a contract to pay a commission for that purpose is illegal.⁷ An agreement entered into by a Mahomedan with a Hindu offering to pay a particular amount to the Hindu to pray on behalf of the Mahomedan for success in a suit instituted by him is not void as being opposed to public policy.⁸ A promise to pay a reward for services rendered in performing certain religious rites is not contrary to public policy.⁹ A covenant for pre-emption does not offend the rule against perpetuities, and hence is not opposed to public policy.¹⁰

19 *Davies v. Davies*, 36 Ch D 359, 364: 56 LJ Ch 962.

20 *Vancouver M. B. & S. Co. v. V. Breweries*, 1934 AC 181: (1934) All ER Rep 38.

1 *Richardson v. Mellish*, 2 Bing. 229, 252: (1824-34) All ER Rep 258.

2 *Admiralty Commssnrs v. Valverde*, (1936)1 KB 724 but see *Powell v. Sheffield Corpn.*, (1936)1 KB 680; (1935) All ER Rep 318; Halsbury, 4th ed., Vol. 9 Paras 392, 393.

3 *Govind v. Pacheco*, 4 Bom LR 948.

4 *Cleaver Mutual R. F. Life Association*, (1892)1 QB 147: (1891-94) All ER Rep 335.

5 *Beresford v. R. I. Co.*, 1938 AC 586: (1938)2 All ER 602.

6 *James v. British Insurance Co.*, (1927)2 KB 311: (1927) All ER Rep 442.

7 *Montefiore v. Mendeny Motor Co.*, (1918)2 KB 241: (1918-19) All ER Rep 1188.

8 *Balasundara v. Mahomed*, 57 MLJ 154; *Bhagwandat v. Raja Ram*, 49 A 705 distgd.

9 *Bapuji v. Natranjan*, 162 IC 984.

10 *Ram Baran v. Rum Mohit*, AIR 1967 SC 744, 749.

The recognised heads in the classification of agreements to do that which it is the policy of law to prevent are: (1) agreements which injure the State in its relation with other States; (2) agreements tending to injure the public service; (3) agreements which tend to pervert the Court of justice; (4) agreements which tend to be an abuse of legal process; (5) agreements which are contrary to good morals; and (6) agreements which affect the freedom of trade.¹¹

Certain heads of public policy are well known and recognised, *e.g.*, a contract for marriage brocade, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or the assisting of the King's enemies. They are unlawful because these things have been assumed by the common law to be unlawful and not because a court has a right to declare that such and such things are in its view contrary to public policy. No court can invent a new head of public policy. Public policy is always an unsafe and treacherous ground for legal decision. A contract or other transaction which is against policy *i.e.*, the general interest of the country, is illegal.¹² Public policy is not capable of sudden extensions.¹³ As has been observed, "You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contract, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, the courts have this paramount public policy to consider—that they are not lightly to interfere with this freedom of contract".¹⁴ A man's right to work at his trade or profession is just as important to him as his rights of property. Just as the Courts will intervene to protect his rights of property, so they will also intervene to protect his right to work. So in *Nagle v. Feildom*,¹⁵ where the plaintiff, a woman, had been refused a trainer's licence by the Jockey Club as it was the practice of the stewards of that club to refuse to grant a trainer's licence to a woman in any circumstances, it was held by the Court of Appeal that such practice might be void as contrary to public policy. Similarly in an Indian case it has been observed that the grounds on which a suit is barred by public policy are strictly limited and it is unsafe to make any addition to the classes of suits that can be so barred.¹⁶ If a contract be found to be valid the court will not be prevented by considera-

11 *Bhagwan v. Murari*, 39 A 51 FB; disapproved in *Sajjad v. Nanhi*, 47 IC 694, but approved in *Balkissen v. Debi Singh*, 52 IC 153; *Halsbury*, 4th ed., Vol. 9 Paras 394-400.

12 *Janson v. Driefontein Mines*, 1902 AC 484, 491, 500, 507; (1900-08) All ER Rep 426.

13 *Shrinivas v. Ram*, 44 B 6, 23; *Gholam v. Altuf*, 58 CLJ 333; *Dhirendra v. Chandra Kanta*, 36 CLJ 82.

14 *Printing Co. v. Sampson*, LR 19 Eq 462; *Admiralty Commissioners v. Valverde*, (1936) 1 KB 724.

15 (1966)2 WLR 1027 CA where the law on the subject is fully discussed.

16 *Bhagwandat v. Raja*, 49 A 705; *Bhagwant v. Ganga*, 1940 B 369.

tions of public policy (or public utility) from proceeding to enforce it.¹⁷ A person alleging an agreement to be void on account of its being opposed to public policy must prove the grounds on which to bring it under the section.¹⁸ Inconvenience to the public is no ground for refusing to perform a contract.¹⁹ Vague grounds of equity will not justify a court to interfere with a contract.²⁰ Government cannot hamper freedom of action in matters which concern the welfare of the State.¹ A compromise is a suit which is opposed to public policy is void. In *Sri Krishna v. A.D.M.*² a compromise in a suit between the landlord and the tenant in contravention of the Rules under the U.P. (Temporary) Control of Rent and Eviction Act, 1947 was held to be opposed to public policy and hence void. There a certain shop room was allotted to the tenant by the Rent Controller on the recommendation of the District Magistrate. The landlord filed a suit challenging the order of allotment and in that suit under a compromise the tenant waived his claim to the shop room. Thereafter the tenant again applied for restoration of possession and the Rent Controller allowed the application. The Supreme Court confirmed the order of the Rent Controller with these words: "By an agreement of the kind embodied in the compromise petition the parties could not curtail the powers of the District Magistrate. It was unlawful and against public policy of the law to do so".

Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied (*Chitty on Contracts*, 21st Ed., p. 381; *Stackhouse v. Barnston*, 10 Ves 453, 466; 32 E.R. 921). But an agreement to waive an illegality is void on grounds of public policy and would be unenforceable.³

11. Illustrations.—An agreement between an officer in public service and a candidate that the former should resign and that the emolument of the office should be shared between them is illegal and void.⁴ An agreement to waive the benefit conferred by S 60 (i), C.P.C. is void.⁵ A contract to guarantee or undertake that an honour will be conferred by the sovereign if a certain contribution is made to a public charity is against public policy.⁶ It is contrary to public policy to allow a man to betroth his minor daughters to persons and to undertake to pay a penalty in case he does not carry out the contract. It is a contract giving him a pecuniary interest in the marriage of minors and hence void.⁷ Any contract having a tendency, however slight, to affect the

17 *Lloyd v. L. C. & D. Ry.* 34 LJ Ch 401.

18 *Subayyan v. Ponnu* 1941 M 727.

19 *Raphael v. T. V. Ry.* LR 2 Ch 147.

20 *Sabraton v. Dhanpat*, 1933 A 70.

1 *Buttigieg v. Cross*, 1947 PC 29.

2 AIR 1975 SC 1525.

3 *Waman v. Ratilal*, AIR 1959 SC 689, 694.

4 *Waldo v. Martin* 4 B&C 819; 107 ER 1078; *Graeme v. Wroughton* 24 LJ Ex 265.

5 *M. & S. M. Ry. v. Rupchand*, 1950 B 155.

6 *Parkinson v. College of Ambulance*, (1925)2 KB 1; (1924) All ER Rep 325.

7 *Fazal v. Nur*, 157 IC 736.

administration of justice is illegal and void.⁸ Thus, a stipulation that no criminal proceeding should be begun against the plaintiff, as also stipulations as to the conduct of pending criminal proceedings against a third party, being illegal, vitiate a bond executed in consideration thereof.⁹ An agreement to acknowledge a forged signature in consideration of the other party forbearing to prosecute the actual forger is against public policy and void.¹⁰ An agreement to withdraw from a prosecution for felony, provided the person accused will promise to bring no action for trespass and false imprisonment or malicious prosecution, is void.¹¹ A purchase by an attorney of the subject of a suit, of which he has the conduct as attorney, whilst the case is still undetermined by judgment, is opposed to public policy and void.¹² But an absolute sale, instead of a contract for security for past advances during suit, is not contrary to public policy.¹³ Agreements which are likely to prevent the property to be auctioned from realising its fair value and damp the sale is against public good but an agreement between two or more persons not to bid against each other is not illegal or against public good.

The respondent, who owned 139 acres of land cultivated with rubber in Malaya, in order to avoid the Rubber Regulations of 1934, under which the permissible production of holdings of rubber land of more than 100 acres was assessed by an assessment committee whereas that of less than 100 acres was assessed by the local district officer, transferred 40 acres of the land to his son, the appellant, for a purported consideration which was not in fact paid. The transfer was duly registered and a certificate of title issued to the son. Thereafter the father, having agreed to sell the 40 acres to a third party, asked his son to execute a power of attorney so as to enable him to transfer the land to the prospective purchaser. The son having refused to do so, the father brought the present proceedings claiming that the son was a trustee of the 40 acres holding them on trust for him. It was held that the father was not entitled to a retransfer of the land from the son. He had of necessity to disclose in the proceedings that he had practised a deceit on the public administration (of which act the courts were bound to take notice even though the son had not pleaded it) and he could not use the process of the court to get the best of both worlds—to achieve his fraudulent purpose and also to get property back.¹⁵

Where under permits issued to others and purchased by the plaintiffs they allowed the defendants' grains to be exported and sued for the amount paid

⁸ *Egerton v. Brownlow*, 4 HLC 1, 163: (1843-60) All ER Rep 970.

⁹ *Lound v. Grimwade*, 39 Ch D 605: 59 LT 168.

¹⁰ *Brook v. Hook*, LR 6 Ex 89, 99: 40 LJ Ex 50.

¹¹ *Rawlings v. Coal Consumer's Assocn.*, 43 LJMC 111.

¹² *Simpson v. Lamb*, 26 LJQB 121.

¹³ *Anderson v. Radcliffe*, 29 LJQB 128; see s. 216 n. 3.

¹⁴ *Lachman v. Sita Ram*, AIR 1975 Delhi, 159.

¹⁵ *Palaniappa v. Arunasalam*, (1962)2 WLR 548 PC See also *Kiriri Cotton Co. Ltd. v. Dewani*, (1960)2 WLR 127: (1960)1 All ER 177 PC a case of payment by tenant of premium for lease contrary to the provisions of section 3(2) of the Uganda Rent Restriction Ordinance, 1949.

for those permits; if the transactions had taken place during war they would have been considered contrary to public policy but not so in time of peace and therefore, the plaintiffs were entitled to recover the amounts.¹⁶ An agreement to transfer the right of carrying mails is void.¹⁷ It may be lawful for a man to evade the execution of a decree against him by various devices, but an agreement between several persons the object of which is that a decree against one of them should be evaded, or its execution delayed, is contrary to public policy.¹⁸ The fact that a part of the consideration is dependent on the result of a suit does not make the transaction void as being opposed to public policy.¹⁹ A contract for the sale of rice in breach of the conditions imposed by the government is opposed to public policy and void.²⁰ A contract providing for a premium over and above the standard rent is opposed to public policy.²¹ A contract to secure votes is not void as being opposed to public policy.¹ A promissory note executed by the defendant in consideration of the plaintiff's friend agreeing to give evidence for the defendant is void.² A recommendation made to an appointing authority on receipt of a pecuniary consideration is opposed to public policy.³ Where a Protestant before his marriage promised a Catholic girl that the children should be brought up in her faith, the antenuptial promise is void in view of the husband's undoubted legal right to impart religious training and education to his children.⁴ A promise to defend an action brought against the plaintiff for publishing a libel at the defendant's request is void.⁵ A promise to conduct insolvency proceedings in a manner so as to injure as little as possible the debtor's credit forms an abuse of the process of the court and is void.⁶ An agreement by a person, in consideration of his rights in some joint and undivided property, not to sell or mortgage his share except to the other contracting party, who had also an interest in the same property, is valid.⁷ An insurance policy covering the risk of death by suicide is not void.⁸

An agreement between the *pariwals* of a temple and certain *pandas* to the effect that the latter should receive a share of the offerings made there is not void as being against public policy.⁹ An agreement partitioning disciples (*jajmans*) as between two parties and providing for payment of compensation in case of breach of the agreement is against public policy and void.¹⁰ A

16 *Yar v. Madhowji*, 123 IC 299.

17 *Bhurmali v. Goduram*, 1943 N 260.

18 *Nandkishore v. Kunj Behari*, 31 ALJ 85.

19 *Tribeni v. Ramasray*, 136 IC 49.

20 *Janu v. Ramaswami*, 72 IC 735.

21 *Kusum v. Kanhaiyalal*, AIR 1974 Raj 73, 76.

1 *Blton v. Madden*, LR 9 QB 55: 43 LJ QB 35.

2 *Adiraja v. Vittil*, 23 IC 540.

3 *Karuppiah v. Ponnuchami*, 65 MLJ 532.

4 *Re Agar-Ellis*, 10 Ch D 49, 71.

5 *Shackell v. Rosier*, 2 Bing, NC 634: (1835-42) All ER Rep 495.

6 *Bracewell v. Williams*, LR 2 CP 196: 15 LT 215.

7 *Lakshmi v. Tori*, 1 A 618.

8 *Scottish U. & N. Insee. v. Roushan*, 1945 O 152.

9 *Kallu v. Rajindra*, 45 A 79.

10 *Khudiram v. Sarada*, 42 CWN 1038.

contract by which a priest undertakes that if he performs certain ceremonies without calling in the plaintiff to assist him he will pay to the plaintiff a part or the whole of his earnings is not opposed to public policy.¹¹ A sale of the share of the offerings made to a shrine is not opposed to public policy if effected in favour of a participant in the offerings.¹² Where the plaintiff and the defendant entered into a contract by which the plaintiff undertook to perform some kind of *pūja* in order to cause the defendant to be successful in his suit, the intention of the parties evidently was that the plaintiff should exercise some influence unauthorised by law on the mind of the court, hence the contract was void.¹³ A contract between the plaintiff and the defendant to enable the plaintiff to keep up her connection, spiritual as well as worldly, with the pilgrims of her husband and to enjoy the benefits which result from such connection is lawful.¹⁴

An indemnity given by an accused in a criminal case or by anybody else to the surety is void.¹⁵ Where, contrary to the conditions of his service, an employee obtains by agreement an interest in a lease procured for his relations, the agreement is immoral and opposed to public policy.¹⁶ Upon separation a post-nuptial settlement upon the wife by the husband is binding.¹⁷ Where husband and wife having taken out cross summons for assault orally agreed to live separate, and the husband agreed to pay her a sum by way of maintenance, the agreement was valid.¹⁸

Where a bond provides for interest in the shape of work, it is a slavery bond.¹⁹ But it has also been held that an agreement to work for a certain number of years in lieu of interest is not a contract of slavery but is like a contract of apprenticeship and therefore not opposed to public policy.²⁰ A slavery bond is of course unenforceable and void.¹ It is in substance a pledge of human beings in consideration of a loan.² An agreement seeking to create a monopoly is unenforceable.³

The King's subject cannot trade with an alien enemy, *i.e.*, a person owing allegiance to a government at war with the King, without the King's licence. Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation. No action can be maintained against an insurer of an enemy's goods or ships against capture

11 *Bapu v. Harihar*, 38 IC 116.

12 *Maula v. Sajawal*, 141 IC 427.

13 *Bhagwan v. Raja Ram*, 49 A 705.

14 *Lachmi v. Kissen*, 11 CWN 147.

15 *Consolidated Finance Co. v. Musgrave*, (1900) 1 Ch 37; (1895-99) All ER Rep 1227.

16 *Muhammad v. Azizullah*, 11 IC 2.

17 *Randle v. Gould*, 27 LJQB 57.

18 *Mc Gregor v. Mc Gregor*, 21 QBD 424; 57 LJ QB 591.

19 *Rama v. Pakkuri*, 106 IC 850.

Ponnusami v. Palayathan, 51 IC 252.

1 *Sundara v. Jagannathan*, 103 IC 96.

Soori v. Subbarayar, 40 IC 235.

3 *Kameshwar v. Yasin*, 17 Pat 255.

by the British Government. An insurance by an alien against hostile seizure is good and the claim under the policy is recoverable if the seizure be made actually before the actual declaration of war. If a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace.⁴ With regard to enemy property seized and ordered to be sold, no action is maintainable by the insurance company for the recovery of the sale proceeds.⁵ The shipment of a cargo from an enemy's port even in a neutral vessel is forbidden by law as involving a trading or dealing with the enemy.⁶

12. **Stifling Prosecution.**—Stifling a prosecution is illegal even though there is no injury to the public.⁷ As has been said “you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself”. Accordingly a settlement made by a father with certain bankers in order to shield his son from a criminal prosecution on the charge of forgery has been held to be invalid.⁸ The reason is that the effect of such an agreement is to take the administration of the law out of the hands of judges and put it in the hands of a private individual and so has a tendency to subvert public justice.⁹ A trial for an offence need not actually be in progress to make an agreement for stifling a prosecution improper. The section applies if the object of the agreement be to cause the withdrawal of an application for sanction to prosecute under S. 195 of the Criminal Procedure Code. What is required is a collusion between the parties affecting the due course of the criminal law.¹⁰ Thus, if it be an implied term of an agreement for a reference to arbitration that a complaint of a non-compoundable offence should not be further proceeded with, then the consideration of the agreement is unlawful and the award is invalid, quite irrespective of the fact whether the prosecution in law had been started or not.¹¹ An agreement is not void if made while a possibility of criminal prosecution exists. To determine the nature of the consideration the court is not confined to the terms of the agreement.¹² It is contrary to public policy to compound a non-compoundable criminal case, but before this principle of law can be invoked it is necessary to prove that the case was compounded, that is to say, settled by a *quid pro quo* and not that it was withdrawn merely

4 *Janson v. Driefontein Mines*, 1902 AC 484: (1900-03) All ER Rep 426.

5 *Helvetia v. Admnstr-G.*, (1931) 1 KB 672.

6 *Esposito v. Bowden*, 7 E&B 763: (1843-60) All ER Rep 918.

7 *Windhill Local Board v. Vint*, 45 Ch D 351.

8 *Williams v. Bayley*, LR 1 HL 200: (1861-73) All ER Rep 227, fold in *Flower v. Sadler*, 10 QBD 572.

9 *Lachman v. Narain*, 25 IC 409; see s. 23.

10 *Warisali v. Mohamed*, 46 IC 424; *Bhowanipore B. Corp. v. Durgesh*, 1941 PC 95.

11 *Kamini v. Birendra*, 57 IA 117, fold in *Gopal v. Lakshmi*, 37 CWN 749; in *Bakhtawar v. Issardas*, 150 IC 784.

12 *Sirish v. Supravat*, 1940 C 337.

as unsustainable.¹³ A distinction has been drawn between cases where (1) the liability upon the document in suit is not made contingent upon the complaint being dismissed or withdrawn, and (2) where the document sued is expressly made to take effect only after the complaint is withdrawn and the accused discharged. In the latter case the document has been executed in consideration of the withdrawal of a non-compoundable criminal case and, therefore, is unenforceable, but not so in the former case.¹⁴ As to what is meant by the compounding of an offence, see *Murray v. Queen Empress*.¹⁵ Compromise of a prosecution commenced by a bank against a bankrupt is an illegal contract being an agreement to interfere with the course of justice.¹⁶ But offences which involve damages to an injured party, for which he may maintain actions, may be compromised or settled, notwithstanding that the offences are also of a public nature.¹⁷ An action is not maintainable on a promissory note¹⁸ or a bond¹⁹ executed in order to protect a person from being prosecuted for embezzlement. A promissory note may be taken for an existing debt by threat of criminal prosecution, though the prosecution may not be undertaken; but the abstention from or dropping of a criminal prosecution should not be made a matter of bargain.²⁰ Where the consideration of a promissory note is not to sue in tort or on a quasi-contract, the object of the agreement is not illegal.¹

The essential element in what is described by English lawyers as "stifling a prosecution" is the tampering with the administration of justice by a private individual.² Such an agreement seldom sets out the consideration, which has to be inferred from the conduct of the parties after a survey of the whole of the circumstances of a case.³ Agreements for stifling a prosecution no doubt come within the rule laid down by the section. It has been repeatedly held that there is a good deal of difference between the motive of an act and the consideration or object of the agreement, and that where there is a transaction between the parties involving a civil liability as well as possibly a criminal act, a contract made to discharge the civil liability cannot be held to be void under the section.⁴

13 *Sadho v. Jhinka*, 116 IC 749; *Sudhindra v. Ganesh*, 1938 C 840; *Matta v. Matta*, 1941 P. 349.

14 *Shanti v. Lalchand*, 103 IC 444.

15 21 C 103.

16 *Re Campbell*, 14 QBD 32; 33 WR 642.

17 *Keir v. Leeman*, 15 LJQB 360; 9 QB 371; 115 ER 1315.

18 *Jones v. Merionethshire P. B. Society*, (1892) 1 Ch D 173; 61 LJ Ch 138; *Banu v. Ratan*, 1937 A 370.

19 *Bion v. Sheogulam*, 74 IC 843.

20 *Pakalapati v. Devula*, 1936 M 656.

1 *London & L. Insee. Co. v. Binoy*, 1945 C 218.

2 *Birendra v. Basanta*, 91 IC 624; an agreement for reference to arbitration was held not void; per contra *Thandamoyee v. Goonamani*, 47 IC 506.

3 *Mohan v. Kashi*, 1950 N 71.

4 *Dwijendra v. Gopiram*, 53 C 51, refing to *Sukhdeo v. Mangal Chand*, 41 IC 812; *Jaitkumar v. Gauri Nath*, 28 A 718, fold in *Onkar Mal v. Ashiq Ali*, 49 A 540; *Ram v. Ganeshi*, 85 IC 610; *Sudhindra v. Ganesh*, 1938 C 840; *Ramasray v. Lal*, 183 IC 507.

Where the consideration for an agreement is the compounding of a non-compoundable criminal charge the consideration is unlawful and under this section the agreement cannot be enforced. The following rules deduced from decided cases have been laid down in *Sayamma v. Punamchand*:⁵ (i) Where the consideration for an agreement is a promise not to prosecute for an offence which is non-compoundable the agreement is not enforceable at law.⁶ (ii) But this limitation on the freedom of contracts will only be enforced when it is clear that the consideration for the agreement was an illegal promise as stated above.⁷ An agreement to compound an offence, compoundable with court's permission though not by the parties themselves, is not illegal when court's permission is obtained.^{7a} Even if part of a consideration be the stifling of a prosecution the entire agreement will be illegal.⁸ As has been pointed out,⁹ the mere fact that the plaintiff did not prosecute the defendant, as at one time he threatened, will not warrant the court in coming to the conclusion that there was an agreement on his part to abstain from prosecuting. The court must be satisfied that the promise was made to stifle a prosecution. It is immaterial that a third person undertook to pay off the liability of the defendant. An agreement to refer a civil dispute to arbitration cannot be impeached under this section,¹⁰ not even if a prosecution was pending at the time which was dropped on the application of the parties.¹¹ "There is nothing against public policy if a person accused of breach of trust or misappropriation chooses to acknowledge the liability and refund the amount. And if after receiving the amount the complainant withdraws from the prosecution of his complaint it need not necessarily be presumed that there was a contract that he should do so".¹² It does not therefore necessarily follow that because a criminal prosecution for a non-compoundable offence has, in fact, been withdrawn as a result of an agreement, the object of that agreement is opposed to public policy and the agreement is void.¹³ There is a good deal of difference between motive and consideration. An agreement the consideration for which is a pre-existing

5 57 B 678, 687; 35 Bom LR 850.

6 *Kessowji v. Hurjivan*, 11 B 566; *Dalsukhram v. De Bretton*, 28 B 326; *Bani Ram v. Jayawanti*, 42 B 339; *Kamini v. Birendra*, 57 C 1302 PC; *Jones v. Merionethshire P. B. Society*, (1892) 1 Ch 173; *Williams v. Bayley*, LR 1 HL 200; (1861-73) All ER Rep 227; *Collins v. Blantern*, 1 Sm LC 406; (1558-1774) All ER Rep 33; *Durgesh v. Bhowanipore Banking Corp.*, 43 CWN 260; *Sudhindra v. Ganesh*, 43 CWN 147; *Motumal v. Ibrahim*, 1944 S 80; *Mir v. Abdul*, 1939 L 187.

7 *Jaikumar v. Gouri*, 28 A 718; *Dwijendra v. Gopiram*, 53 C 51; *Onkarmal v. Ashiq*, 49 A 540; *Sukhdeo v. Mangal*, 2 Pat LJ 630; *Flower v. Sadler*, 10 QBD 572; *Kamini v. Birendra*, 57 C 1302 PC.

7a *Thakur v. Hamid*, AIR 1973 Raj 260.

Chandan v. Rupa, 1942 M 173; *Premji v. Govindji*, 1943 S 197.

9 *Lack v. Lloyd*, 13 LJCP 5: 134 ER 1109; reld. in *Lakshmana v. Narasinha*,

10 *Warisa*, 435.

95. *Id v. Firm Harjas*, 117 IC 74.

11 *Kamini v. Tekchand*, 101 IC 786.

Bakhtawar v. Naina, 115 IC 156; *Widya v. Jai Dayal*, 140 IC 220.

12 *Strish v. Sup Tan*, 121 IC 803.

liability and not the stifling of prosecution is not illegal under this section.¹⁴ So also, where there is a pre-existing liability, and the person liable undertakes to discharge that liability by executing an agreement, it cannot be avoided merely because there was a simultaneous prosecution pending against him in Criminal Court.¹⁵ A man embezzling a sum of money exposes himself to the risk of criminal prosecution but he also remains under a civil liability to his master. A security taken for this amount, even though the debt arises out of a criminal offence, is enforceable in law.¹⁶ A pronote executed to escape civil or criminal liability is not one to stifle prosecution. Where C voluntarily executes a pronote in favour of B to avoid civil or criminal proceeding for purchasing from A, an employee of B, goods stolen from B's store the pronote cannot be said to have been executed to stifle prosecution.¹⁷ The withdrawal of a false complaint intentionally lodged to coerce the opposite party to enter into an agreement is not good consideration for such agreement, even though the offence alleged is a compoundable one.¹⁸ Where in order to prevent the arrest of A under a warrant issued on the complaint of B, C executed a bond and undertook the liability of A, thereupon B got the complaint dismissed and sued C for the recovery of the amount due from A, the consideration of the agreement being the withdrawal of the prosecution, the suit must fail, as C was not personally interested in making the payment; where a party personally liable enters into such an agreement, the case is different.¹⁹ A reference to arbitration is not void on the ground of stifling a prosecution where the reference is to a transaction wholly independent of and separate from the criminal case.²⁰

If a person sets the machinery of the Criminal Law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy. Once the machinery of the Criminal Law is set into motion on the allegation that a non-compoundable offence has been committed, it is for the criminal courts and criminal courts alone to deal with that allegation and to decide whether the offence alleged has in fact been committed or not. The decision of this question cannot either directly or indirectly be taken out of the hands of criminal courts and dealt with by private individuals.

So, where the parties to a pending criminal case with regard to offences under Ss. 420, 465, 468 and 477 read with Ss. 107 and 120-B I. P. C., some of which are non-compoundable, entered into an agreement on the date of

14 *Shanti Sarup v. Lal Chand*, 103 IC 444; *Gafoor v. Hemanta*, 35 CWN 28; *Deb v. Anath*, 35 CWN 26; *Sudhindra v. Ganesh*, 1938 C 840; *Harnarain v. Ram*, 1941 O 393.

15 *Mohammad v. Adil*, 151 IC 1025.

16 *Ali v. Mohammad*, 28 ALJ 1297.

17 *R. Sivaram v. T. A. John*, AIR 1975 Ker 101.

18 *Sanaullah v. Kalimullah*, 137 IC 790.

19 *Nabihad v. Abdul*, 28 ALJ 1592.

20 *Shiva v. Thakur*, 128 IC 748.

hearing of the criminal case whereby the parties agreed to refer their dispute to arbitration in consideration of the complainant withdrawing the criminal case and the dispute was actually referred to arbitration on withdrawal of the case, it was held that the arbitration agreement was invalid under S. 23, Contract Act, as being opposed to public policy.¹

An agreement to compound a non-compoundable offence being void,² the circumstance that the magistrate wrongfully suggested or sanctioned the compromise makes no difference whatsoever,³ nor the fact that a part of the consideration is legal.⁴ If the object of an agreement be the hope that the prosecution would be dropped, the agreement would not be illegal.⁵ Where a promissory note was executed in consideration of compounding a charge of grievous hurt against a person who had died previous to the complaint, as the offence could not be compounded except with the consent of the person to whom the grievous hurt was caused, the agreement to pay money was illegal and the promissory note was consequently unenforceable.⁶ An offence, which is not compoundable except with the permission of the court, is, in the absence of any express permission, a non-compoundable offence, and where such a compromise furnishes consideration for an agreement, the consideration is illegal,⁷ but not if the offence be compounded with permission.⁸

Where a prosecution for a criminal breach of trust was withdrawn on the defendant agreeing to pay a certain sum of money and to execute a mortgage for another sum, and the withdrawal was effected with the permission of the police at the request of the complainant, the consideration and the object of the agreement were not illegal.⁹ The institution of a criminal prosecution may be the occasion for a reference to arbitration, yet if it was in reality the civil dispute between the parties as regards the sum of money alleged to have been advanced which was the subject of reference to arbitration, the real object of the agreement not having been to interfere with the course of justice, a suit is maintainable for the recovery of the sum found due.¹⁰ Where a loan was advanced by the plaintiff to the defendant for the payment partly of a decretal debt and partly for the purpose of preventing the institution of criminal pro-

1 *Narasimha v. Gurumurthy*, AIR 1963 SC 107. See also *Ouseph v. Catholic Union Bank*, AIR 1965 SC 166.

2 *Amir Khan v. Amir Jan*, 3 CWN 5, fold in *Badri v. Ram*, 10 IC 189; *Chetan v. Hari*, 10 IC 216; *Sunder v. Bhagoo*, 62 IC 70; *Nihal v. Ashtabakar*, 127 IC 705; *Muhammad v. Samad*, 20 CWN 946; *Saktay v. Mahadin*, 125 IC 385; *Gaya v. Jamna*, 155 IC 341; *Westby v. Westby*, 2 Dr & W (620); *Jewai v. Godreze*, 1941 R 281; *Raja Ram v. Charanji*, 1939 L 98.

3 *Majibar v. Muktashed*, 40 C 113; *Windhill v. Vint*, 45 Ch D 351; 59 LJ Ch 608; *Bindeshari v. Lekhraj*, 1 Pat LJ 48; *Saktay v. Mahadin*, 125 IC 385.

4 *Karuna v. Rakhai*, 68 IC 721; *Bholanath v. Rasool*, 77 IC 78.

5 *Azim v. Adil*, 1934 Pesh 105.

6 *Mottai v. Thannappa*, 37 M. 385; *Muhamad v. Wahiuddin*, 24 ALJ 311; *Nazar v. Jalal*, 73 IC 668.

7 *Ganeshi v. Hassan*, 4 IC 999.

8 *Muhammad v. Samal*, 32 IC 227.

9 *Dwijendra v. Gopiram*, 29 CWN 855; *Rameshwar v. Upendra*, 29 CWN 1029.

10 *Gaya v. Jamna*, 155 IC 341.

ceedings, in which the defendant and his witness had exposed themselves in the former suit, it was a loan for an unlawful consideration and therefore irrecoverable.¹¹

In cases where there is a choice between a civil and a criminal remedy a compromise of proceedings is not illegal.¹² "Where a *bona fide* debt exists and the transaction between the parties involves a civil as well as possibly a criminal act, a promissory note given by the debtor and by a third party as security for the debt constitutes a valid agreement".¹³ Where however the matters of indictment are matters of public concern, they are not the subject of compromise, for it is the duty of every prosecutor, where the public are interested, to prosecute either to conviction or to acquittal, *i.e.*, it is inexpedient to stop the course of law in a criminal matter where a public right is involved.¹⁴

One cannot enter into a contract not to lead evidence in a non-compoundable criminal case which concerns the State and not merely a private individual in consideration of the accused giving up all claims for damages against him.¹⁵ Where a suit was for the enforcement of an agreement for the sale of certain premises, and the defence was that the sale was for the purpose of offering a bribe to withdraw a charge of criminal breach of trust, the plaintiff, if he be not a party to or in any way aware of the unlawful agreement, would be entitled to a decree.¹⁶ A compromise of proceedings which are criminal only in form and really involve private rights may be lawful.¹⁷ An agreement to remunerate a person that he may exercise his influence to effect a settlement is not opposed to public policy.¹⁸

13. **Champerty and Maintenance.**—The law of maintenance is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions, or to make defences which they have no right to make, but it would not be maintenance if he furnishes a poor litigant with the means of obtaining redress.¹⁹ A bargain that the plaintiff will maintain an action in consideration of the defendant transferring to him half the property which the defendant might become possessed of as the fruits of the action is illegal as being champertous according to English law.²⁰ It has however been remarked that "the old cases are exploded, the sole question is, have the parties an interest, or do they believe they have an interest, in the

11 *Probadha v. Banka*, 56 CLJ 413.

12 *Fisher v. Apollinaris Co.*, LR 10 Ch 297 (in an action for infringement of trade mark no evidence was given).

13 *Jai Kumar v. Gouri*, 28 A 718; *Tek Chand v. Harjas*, 117 IC 74; *Fowler v. Sadler*, 10 QBD 572.

14 *Windhill, Local Board v. Vint*, 45 Ch D 351, 359: 59 LJ Ch 608.

15 *Dalsukhram v. De Bretton*, 28 B 326.

16 *Rajkristo v. Koylash*, 8 C 24.

17 *Amir Khan v. Amir Jan*, 3 CWN 5.

18 *Syed Mahomed v. Shah Wazirul*, 16 CWN 480.

19 *Findon v. Parker*, (1843-60) All ER Rep 876; 11 M & W 675, 682; Halsbury, 4th ed. vol. 9 paras 400, 401.

20 *Hutley v. Hutley*, LR 8 QB 112.

action?"¹ Maintenance and champerty are always treated together by writers on the subject. Maintenance is called the genus of an offence of which champerty is a species. Champerty is but a form of maintenance, though it be maintenance aggravated by an agreement to have a part of the thing in dispute. Both are founded on the same principle or policy of law, namely, the tendency of the transaction to prevent the course of justice.² Champerty is "the most odious form of maintenance",³ it is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it.⁴

In *Trepca Mines Ltd, In re*,⁵ the Court of Appeal held that the law of maintenance and champerty was not confined to actions or suits. It extended to proof in a liquidation and to any contentious proceedings where property was in dispute which became the subject of an agreement to share proceeds.

In the same case⁵ Donovan L. J. observed:

"As regards maintenance, the case was instanced of a bank lending money at interest to a customer to finance his litigation and the solicitor concerned in the litigation coming to know about it. Must he discontinue to act for fear that he would otherwise be aiding and abetting the offence of maintenance? I would answer "No". I do not think that in such a case the bank commits the offence. There is nothing here of "officious intermeddling" in someone else's litigation. The bank's advance is made in the course of, and as part of, its ordinary business of lending money at interest. Alternatively, if maintenance were committed, it would be committed when the bank advanced the money; and nothing the solicitor did after that could aid and abet an offence already complete. A similar consideration might apply in the case of an advance by some friend outside the permitted circle of those with common interests or those actuated by charitable motives or by family ties".⁶

The law on the subject of such agreements as administered in India has been laid down by their Lordships of the Privy Council. It is that the English law is not applicable in India nor is substantially the same law in force here. Accordingly, an agreement which would have been void as champertous in English law has been held binding in this country.⁷ There is no specific law against champerty in India.⁸ Contracts of this character, under certain circumstances, have been held to be invalid as being against public policy. A fair agreement to supply funds to carry on a suit, in consideration

1 *Findon v. Parker*, 11 M & W 679: (1843-60) All Rep 876.

2 *Guy v. Churchill*, 40 Ch D 481, 488.

3 *Hutley v. Hutley*, LR 8 QB 112; see *Goculdas v. Lakhmidas*, 3 B 402 for the reasons of these rules.

4 *Stanley v. Jones*, 7 Bing 369; *Stevens v. Bagwell*, 15 Ves 139, 156.

5 (1962) 3 WLR 955, 970-1.

6 See *Ram Coomar v. Chunder Canto*, 4 IA 23.

7 *Bhagwat v. Debi Dyal*, 35 C 420, 426 PC; *Marina v. Valliuri*, 109 IC 87; *Abdul v. Ehsanul*, 65 IC 129; *Vastavaya v. Poosapati*, 26 Bom. LR 786, 811 PC; see the elaborate statement of the law in *Gossain v. Gossain*, 14 CWN 191; *Debi Dyal v. Pertap*, 31 C 433, 439.

8 *Banarsi v. Sital*, 121 IC 295.

of having a share of the property if recovered, ought not to be regarded as being *per se* opposed to public policy, but agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, or made not with the *bona fide* object of assisting a claim believed to be just but for the purpose of gambling in litigation, should not be given effect to.⁹ The burden of proving the agreement to be just is on the party who seeks to recover the amount.¹⁰ The court will have to consider whether the transaction is *bona fide* or unfair and entered into merely for the acquisition of an interest in the subject of litigation.¹¹ The agreement will be opposed to public policy if its object be an improper one, such as betting, or encouraging unrighteous suits, or gambling in litigation, or the enforcement of the agreement against a party may indeed be contrary to the principle of equity and good conscience.¹² A certain sum promised to be paid as remuneration for supplying funds to enable the promisor to carry on litigation is binding.¹³

Where a person agrees to assist another with money for the purpose of litigation but does not pay the full amount, there will be a lien for the amount actually advanced even if the agreement be champertous.¹⁴ Where a rival in trade accepts the responsibility of litigation and gives an indemnity, the indemnity is enforceable and the agreement is not void for maintenance.¹⁵ An agreement between an attorney and a client that the client shall pay a certain sum over and above the costs and charges incurred by the attorney is void on the ground of maintenance.¹⁶ If the solicitor has got any such sum he must account for it and will not be allowed to take up the plea that the contract with the client is void.¹⁷ A promise to pay a bonus of £225 to a solicitor for an advance of £100 for the conduct of a law suit is void on account of champerty.¹⁸ For an advocate in this country to stipulate for or receive a remuneration proportioned to the result of litigation or a claim, whether in the form of a share in the subject matter or a percentage, is highly reprehensible.¹⁹ A certain sum promised to be paid as remuneration for supplying funds to enable the promisor

9 *Ram Coomar v. Chunder Canto*, 4 IA 23, 46; *U. Pe v. Thein*, 1 Rang 565; *Manjal v. Nabi*, 43 IC 74; *Amrita v. Pratap*, 52 CLJ 492; *Begraj v. Alisher*, 77 IC 897; *Ananda v. Laxman*, 61 IC 884; *Kunwar v. Nilkanth*, 20 IA 112; *Indar v. Munshi*, 1 Lah. 124; *Moss v. May*, 149 IC 1113; *Kalimuthu v. Tha*, 14 R 392; *Babu Ram v. Ram*, 151 IC 969, see as to burden of proof; *Ram v. Court of Wards*, 185 IC 590 PC; *Moss v. Mah Nye*, 1933 R 418; *Soon v. Than*, 1934 R 346; *Fateh v. Bute*, 1934 L 1017; *Alopi v. Court of Wards*, 1938 L 23.

10 *Babu v. Ram*, 1934 A 1023.

11 *Chedambra v. Renja*, 1 IA 241.

12 *Ramanamma v. Viranna*, 61 MLJ 94, 101 PC; *Debi Dayal v. Pertap*, 31 C 433, 439.

13 *Raje v. Mangesh*, 138 IC 900 PC.

14 *Pusapati v. Vatsavaya*, 47 IC 563.

15 *British Cash Conveyors v. Lamson Store Co.*, (1908)1 KB 1006; (1908-10) All ER Rep 146, see the history of the law.

16 *Earle v. Hopwood*, 30 LJCP 217.

17 *Re Thomas*, (1894)1 QB 747.

18 *James v. Kerr*, 40 Ch D 449.

19 *Re Bhandara*, 3 Bom LR 102 FB; *Advocate General v. Rustamji*, 14 Bom LR 691.

to carry on litigation is binding,²⁰ but if a professional moneylender were to advance money to a litigant, who is in great need of help in order to enable him to meet the expenses of litigation, in consideration of the conveyance of a large portion of the estate, the contract will be void.¹ A solicitor shall not be permitted to make a gain for himself at the expense of his client beyond the amount of the just and fair professional remuneration to which he is entitled.² An agreement between clients and solicitors that in the event of the latter succeeding in recovering certain property for the former they should receive a share in the property has been held to be pure champerty³ and void, as the agreement is unfair and unconscionable.⁴

If there be a great disproportion between the liability which a financier incurs under the contract and the amount of reward which he is to obtain in the event of the defendant's success, the agreement will be champertous.⁵ If the agreement be neither unfair nor extortionate it is binding,⁶ but not if it be extortionate or unconscionable.⁷ A sale of a fourteen-sixteenths share of the property in suit was not considered in the circumstances to be extortionate and unconscionable.⁸ A transfer of property for the purpose of financing a suit upon the terms that the property or the proceeds realised from the litigation shall be divided between the transferor and the transferee is not *per se* void;⁹ but it will be void if the person financing does not believe the borrower's claim to be a good one.¹⁰ The real test in cases of this nature is whether the transaction is a *bona fide* purchase of a matter in dispute or one for the purpose of maintaining or proceeding with litigation.¹¹ Where a contract is not tainted with any corrupt motive, as stated in *Chedambara v. Renja*,¹² or in *Fischer v. Kamala*,¹³ it will not be champertous simply because the owner took an inadequate price on account of his need.¹⁴ A suit may be speculative, *e.g.* to enforce

20 *Kaje v. Mangesh*, 138 IC 900 PC.

1 *Loke v. Rup*, 11 A 118, see *Chuni v. Rup*, 11 A 57.

2 *Tyrrell v. Bank of London*, 10 HLC 26, 44.

3 *Re Attorneys Act*, 1 Ch D 573; *Kathu v. Vishvanath*, 89 IC 199.

4 *Rees v. De Bernardy*, (1896) 2 Ch 437, 444; *U. Pe v. Thein*, 1 Rang 565, 570.

5 *U. Pe v. Thein*, 77 IC 372, 377; *Achal v. Kazim*, 27 A 271 PC; *Bhagwat v. Debi*, 35 C 420 PC; *Husain v. Rahmat*, 11 A 128; *Raghunath v. Nilkanth*, 20 C 843 (extortionate so not binding); *C. Soon v. Than*, 153 IC 405; *Alopi v. Court of Wards*, 1938 L 23.

6 *Ramji v. Fazl*, 93 IC 959; *Indar v. Munshi*, 56 IC 272; *Ahmedbhoy v. Vulleebhoy*, 8 B 323, 334.

7 *Kunwar Ram v. Nilkanth*, 20 IA 112, 115, fold in *Indar v. Munshi*, 1 Lah 124; *Husain v. Rahmat*, 11 A 128.

8 *Abdool v. Doorga*, 5 C 4; *Tarachand v. Suklal*, 12 B 559; *Niamat v. Ilahi*, 8 IC 500.

9 *Baldeo v. Harbans*, 33 A 626; *Bisheswar v. Jang Bahadur*, 164 IC 1039.

10 *Vijayaraghava v. Pranal*, 1 MLJ 355.

11 *Goculdas v. Lakhmidas*, 3 B 402, 412; *Bhagwat v. Debi Dayal*, 35 IA 48; *Babu v. Ram*, 1934 A 1023.

12 1 IA 241.

13 8 MIA 170.

14 *Gurusami v. Subbaraya*, 12 M 118.

a purchase made for inadequate consideration,^{14a} or a purchase of equity of redemption,¹⁵ but that does not make it champertous. A champertous agreement, even if it is unfair as between the parties to it, cannot be impugned by a third party who is sued in performance of that arrangement.¹⁶

If the agreement between the solicitor and the client was to relieve the latter of his costs in the event of the litigation not being successful, the law of maintenance might have some bearing on such agreement. The question of champerty could arise if the solicitor was to be paid out of the proceeds of the litigation.¹⁷

G, an Advocate of the Supreme Court, entered into an agreement with his client which was embodied in his client's letter as under:

"I hereby engage you with regard to my claim against the Baroda Theatres Ltd., for a sum of Rs. 9,400 (balance due to me).

"Out of the recoveries you may take 50 per cent. of the amount recovered. I will by Wednesday deposit Rs. 200 in your account or give personally towards expenses". It was held that a contract of this kind would be legally unobjectionable if no lawyer was involved, since the rigid English rules of champerty and maintenance did not apply in India. But as G. was an Advocate such an engagement on his part amounted to professional misconduct and called for disciplinary action.¹⁸

14. Marriage brocade contract.—Under English law a marriage brocade contract is illegal. The essence of the mischief aimed at arises not merely where the contract relates to a particular case in which the match may or may not be a proper one but because contracts of this nature are against public interest. At the root of the question of illegality of a marriage brocade contract is the introduction of the consideration of money payment into that which should be free from such taint. Money paid under such a contract is recoverable by the party paying it before the execution of the contract even though the other party has taken some steps and incurred some expense under the contract.¹⁹ A covenant by the husband before marriage to release his wife's guardian of all accounts with a view to securing his consent to the marriage is not binding.²⁰ The marriage of Hindu children is a contract made by their parents and the children themselves exercise no volition. It is equally true of betrothal. But it has been held by High Courts of Bombay,¹ Calcutta,² Madras³

14a *Siva Ramayya v. Ellamma*, 22 M 310.

15 *Gopal v. Gangaram*, 14 B 72; see *Ahmedbhoy v. Vullebhoy*, 8 B 323.

16 *Venkanna v. Atchuta*, (1938) 1 MLJ 610.

17 *Firm of N. Peddanna v. K. V. S. S. Sons*, AIR 1954 SC 26.

18 *In the matter of 'G', a Senior Advocate of the Supreme Court*, AIR 1954 SC 557.

19 *Hermann v. Charlesworth*, (1905) 2 KB 123; 74 LJ KB 620.

20 *Hamilton v. Mohun*, 1 PW 118.

1 *Dholidas v. Fulchand*, 20 B 658.

2 *Ram Chand v. Audatio*, 10 C 1054; *Baldeo v. Mohamaya*, 15 CWN 447, see cases cited.

3 *Kalavagunta v. Kalavagunta*, 32 M 185 FB overruling *Visvanathan v. Saminathan*, 13 M 88.

and Punjab⁴ that a contract which entitles a father to be paid money in consideration of giving his son or daughter in marriage is against public policy and cannot be enforced, though the money if actually paid cannot be recovered once the marriage is solemnised.⁵ Where the marriage has not been solemnised, any money paid,⁶ or ornaments and clothes presented,⁷ may be recovered. An arrangement between A and B that B's daughter shall marry A's son and that, if she fail to do so, B shall pay a sum of money to A, is equally contrary to public policy.⁸ Presents given cannot be recovered after the marriage, as the matter has then gone beyond the stage of agreement and has become a completed contract.⁹ An antenuptial promise, *e.g.*, by the father of the bride to make a gift of a house to the bridegroom, followed by marriage becomes a binding contract. Such contracts are to be distinguished from marriage brocage contracts.¹⁰ A stipulation for the payment of a sum of money by the parent of the bridegroom or the bride after the celebration of marriage is not void.¹¹

On a review of authorities the following rules have been deduced in *Bakshi Das v. Nadu Das*,¹² on the subject of marriage brocage contracts: (i) an agreement to remunerate or reward a third person in consideration of negotiating a marriage is contrary to public policy and cannot be enforced;¹³ (ii) an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare, but give her to a husband, otherwise ineligible, in consideration of a benefit secured to themselves, the agreement by which such benefit is secured is opposed to public policy and ought not to be enforced;¹⁴ (iii) where an agreement to pay money to the parents, in consideration of their consenting to the betrothal, is under the circumstances of the case neither immoral nor opposed to public policy, it will be enforced and damages will be awarded

4 *Wazira Mal v. Rallia*, 128 PR 1889; *Ganpat v. Lahana*, 106 IC 803; see *Abbas Khan v. Nur Khan*, 1 Lah 574.

5 *Kalavagunta v. Kalavagunta*, 32 M 185 FB; *Baldeo v. Mahamaya*, 15 CWN 447, the reason stated.

6 *Gulab Chand v. Fulbai*, 33 B 411; *Ganpat v. Lahana*, 106 IC 803; *Srinivasa v. Sesha Ayyar*, 41 M 197; *Alsidas v. Punam*, 1944 N 159; *Dharani v. Kanhji*, 1949 Pat 250.

7 *Rambhat v. Timmayya*, 16 B 673; *Girdhari v. Neeladhar*, 16 IC 1004; *Alsidas v. Punam*, 1944 N 159; see *Janaki v. Gopi*, 1947 P 132; *Rajendra v. Roshan*, 1950 A 592.

8 *Devarayan v. Mutturaman*, 37 M 393.

9 *Maung Po v. Jha*, 124 IC 263.

10 *Pran v. Hari*, 52 C 425, 430, *Govind v. Radha*, 15 CWN 205 fold; *Sajjad v. Badshah*, 164 IC 823; *Salliyal v. Patti*, 1945 M 165.

11 *Jagadishwar v. Sheo*, 51 IC 856.

12 1 CLJ 261.

13 *Vaithyanatham v. Gangarazu*, 17 M 19; *Pitambar v. Jaggiwan*, 13 B 131; *Sadhu v. Jhaman*, 171 IC 1005; *Dulari v. Vallabdas*, 13 B 126; *Maung Pyo v. Po*, 50 IC 551; *Ramchand v. Auldaito*, 10 C 1054 distgd.; *Bhan v. Kaka*, 1933 L 849.

14 *Vasimanathan v. Saminathan*, 18 M 83 (overruled); *Baldeo v. Jumna*, 23 A 495; *Dholidas v. Fulchand*, 22 B 658.

for breach of it;¹⁵ (iv) a suit will lie to recover the value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage being broken;¹⁶ (v) although a court may not enforce an agreement to pay money to the parents or guardians of an intended bride or bridegroom on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of any sum actually paid pursuant to the agreement if the contract is broken and the marriage does not take place;¹⁷ and (vi) if one of the contracting parties alleges that the agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract.¹⁸ It has however been held in one case¹⁹ that if the marriage does not take place, a suit does not lie against the father of the bride under S. 65 for the recovery of the value of the ornaments given to the bride because presumably she took them with her and he did not get any advantage.

A promise to pay a sum of money for bringing about an adoption is illegal though the adoption itself is not affected.²⁰

15. Agreements tending to injure the public service.—The taking of an assignment of a mortgage by a *patwari* is not a transaction opposed to public policy. The section provides for cases where the consideration or object of the agreement is illegal or opposed to public policy and not where conduct is opposed to public policy.¹ The view to the contrary expressed in older decisions² may be regarded as overruled. But the Punjab High Court has differed from the view expressed in the Allahabad Full Bench case and has held that an agreement by a *patwari* for the acquisition of land within his circle is void.³ As has been pointed out by the Calcutta High Court the government servant Conduct Rules are rules of conduct and not statutory prohibitions, so that a disregard of these rules does not necessarily taint transactions by government servants with immorality or illegality. No court can invent a new head of public policy.⁴ Agreements made ignoring statutory conditions regulating the conduct of business are void, if in laying down the conditions the legislature had the maintenance of public order in view; but the agreements are valid if the conditions are imposed for merely administrative purposes.⁵ If a person

15 *Umed v. Nagindas*, 7 Bom HCR OCLJ 122; *Mulji v. Gomti*, 11 B 412; *Lallan v. Nobin*, 25 WR 32.

16 *Umed v. Nagindas*, 7 BHCR ACJ 122; *Rambhat v. Timmayya*, 16 B 673; but see *Jagannath v. Munno*, 165 IC 247.

17 *Jugessur v. Panchcowree*, 14 WR 154; *Ramchand v. Audatio*, 10 C 1054.

18 *Visvanathan v. Saminathan*, 13 M 83.

19 *Jagannath v. Munno*, 165 IC 247.

20 *Thuri Kothanda v. Thesu Reddiar*, 27 MLJ 416.

1 *Bhagwan v. Murari*, 39 A 51 FB; *Kamala v. Gur Dayal*, 39 A 58 FB; *Balkissen v. Debi*, 52 IC 153; *Lobo v. Britto*, 7 MLJ 268.

2 *Shiam Lal v. Chhaki Lal*, 22 A 220; *Sheo Narain v. Mata Prasad*, 27 A 73; see *Vithal v. Siwa*, 15 IC 933.

3 *Abdul v. Ghulam*, 7 Lah 463; *Sajjad v. Nanhi*, 47 IC 694.

4 *Dhirendra v. Chundra Kanta*, 36 CLJ 82; *Dharwar Bank v. Mahomed*, 33 Bom LR 250.

5 *Abdullah v. Allah*, 100 IC 846, *Bhikanbhai v. Hiralal*, 24 B 622 *refd. to*.

enter into a contract with a public servant which he knows casts upon the servant duties which may conflict with the duties he owes to the public, such a contract is void.⁶ An agreement to sell two and a half annas' share in managing agency by way of bribe offered by D to P, a member of a committee appointed to report on the management of the company by D is not enforceable.⁷

Contracts which have for their object the influencing of appointments to public offices and the restricting of the discretion vested in public officers in the selection of persons to be appointed are illegal and void. Any trafficking or bargain relating to public offices is opposed to public policy because it is calculated to prejudice the interest of the public by obstructing or interfering with the selection in office of the most competent person.⁸ A promise to pay money to a person in order to procure his resignation, with a view to the promisor securing the appointment, is not enforceable as the transaction is a trafficking with reference to an office.⁹

16. **Agreements affecting freedom of trade.**—Agreements having for their object the creation of monopolies are void as opposed to public policy, under English law as also under this section.¹⁰ The rule does not apply where no monopoly is created in favour of any person.¹¹ A contract by which the defendant gets the exclusive right to collect hides of dead animals within the plaintiff's zemindari is of the nature of a monopoly and is unenforceable.¹² An agreement between two persons that one of them shall not bid against the other at an auction or that one of them shall attend the auction and they shall afterwards divide the property is not illegal or void on the ground that it is against public policy.¹³ A combination amongst certain persons not to bid against one another does not constitute any fraud or impropriety such as would vitiate the sale.¹⁴ Such an agreement is not an unlawful agreement and conse-

6 *Sitarampur Coal Co. v. Colley*, 13 CWN 59.

7 *Gulabchand v. Kudilal*, AIR 1966 SC 1734, 1738.

8 *Puttu Lal v. Rajnarain*, 29 ALJ 397; *Amir v. Saheb*, 16 PR 1893; *Ledu Coachman v. Hiralal*, 43 C 115; *Manindra v. Aswini*, 48 C 427; *Montefiore v. Mendey Motor Co.*, (1918) 2 KB 241; (1918-19) All ER Rep 1188; *Blackford v. Preston*, 8 TR 89, 93.

9 *Saminatha v. Muthusami*, 30 M 530.

10 *Somu Pillai v. Municipal Council*, 28 M 520, fold in *Debi Dayal v. Narain Singh*, 100 IC 859; *Dist. Board, Jhelum v. Hari*, 153 IC 39; *Gourmoni v. Panihati Municipality*, 12 CLJ 74, 84; *Attorney General v. Adelaide S.S. Co.*, 1913 AC 781; but see *North W. Salt Co. v. Electrolytic Alkali Co.*, 1914 AC 461; (1914-15) All ER Rep 752.

11 *Mackenzie v. Rameshwar Singh*, 34 IC 754.

12 *Kameshwar v. Yasin*, 17 Pat 255.

13 *Galton v. Emus*, 13 LJ Ch 388; *Heffer v. Martyn*, 36 LJ Ch 372, *M. Mohammed v. A. Narayan Rao*, AIR 1973 Ker 266.

14 *Deorga Singh v. Sheo Pershad*, 16 C 194; *Hari v. Naro*, 18 B 342; *Mahomed v. Savvasi*, 27 IA 17 overruling *Jayinil v. Vijia*, 19 M 315; per contra *Chattamal v. Rewachand*, 28 IC 40, a further agreement for the division of the property obtained by the highest bidder; *Maung Sein v. Chee*, 99 IC 270; *Ambika v. Whitwell*, 6 CLJ 111; *Mahadeo v. Kewalram*, 44 IC 228; but see *Parduman v. Bawa*, 1943 L 100.

quently is enforceable. A knock-out agreement that a bid should be for a number of persons and not solely for the bidder is not invalid.¹⁵ An agreement between two tenderers for obtaining a licence from government to carry mails does not come under the section.¹⁶ An agreement between the decree-holder and a co-sharer of the judgment-debtor that they would not bid against each other does not amount to fraud and is not in itself sufficient to vitiate the auction sale.¹⁷ But "all purchasers are bound to abstain from breaches of trust and from intimidation or falsehood in keeping off bidders".¹⁸ A contract not to bid to be void under this section, it must clearly be shown that it was intended to effect the purpose by illegal means.¹⁹ A promise by a defendant to pay Rs. 350 a month in consideration of the plaintiff agreeing not to set up or carry on a certain business is void, S. 25, the plaintiff's promise being in restraint of trade.²⁰ A settlement to carry on a trade in a certain area in return for the payment of a sum of money is not void as the lessor does not bind himself against giving a similar lease to anyone else.¹

17. **Effect of illegality.**—In cases which fall under the section the agreement is void *ab initio*. A voidable transfer does not fall within the ambit of the section.² "You cannot sue upon an illegal contract",³ unless the contract is severable.⁴ A plaintiff cannot get a decree for money lent for the express purpose of accomplishing an illegal object, *e.g.*, giving a bribe to an official.⁵ A bond or other security connected with an illegal agreement cannot be enforced.⁶ Where a deposit has been made in connection with an illegal agreement, the deposit can be recovered by suit if plaintiff does not rely for his claim on the illegal agreement.⁷ There is no doubt that when a contract is void for illegality, as opposed to being merely nugatory, money paid or goods delivered in performance of it cannot ordinarily be recovered unless it is executory, but there are a few exceptions to the rule.⁸ Where the principal sells his export licence through his agent to a third party in violation of the Export (Control) Order, the principal cannot recover the price realised by the agent.⁹ The court looks with disfavour on the objection of illegality of a contract,

15 *Gobindo v. Shyam*, 1 CLJ 85; *Ah Foke v. Nagappa*, 46 IC 755; *Jyotiprakash v. Jhownmull*, 36 C 134, *Pathipati v. Nagula*, (1950)2 MLJ 634.

16 *Mahommed v. Dodda*, 1946 M 289.

17 *Satis v. Porter*, 9 CLJ 244.

18 *Mahomed v. Savvasi*, 27 IA 17; *Hari v. Naro*, 18 B 342; *Doorga v. Sheo Pershad*, 16 C 194.

19 *Maung Sein v. Chee*, 3 Rang 275.

20 *Hurry v. Authilachmy*, 33 IC 238 FB.

1 *Mackenzie v. Rameshwar*, 34 IC 754.

2 *Parasharam v. Sadasheo*, 167 IC 703.

3 *Farmer's Mart v. Milne*, 1915 AC 106, 111.

4 *Odessa Tramways Co. v. Mendel*, 8 Ch D 235; see S. 57.

5 *Attar v. Haku*, 24 IC 692.

6 *Bridges v. Fisher*, 23 LJQB 276.

7 *Liladhar v. Sunderlal*, 136 IC 875.

8 *Asaram v. Ludheswar*, 1938 N 335.

9 *N. Bhaironbhai & Co. v. Kashi Ram*, AIR 1973 Raj 271, 278.

urged by a party to that contract, in order to avoid the performance of acts which he has stipulated to do and for which he has received the consideration he has contracted for.¹⁰ The onus of establishing the illegality of a contract lies heavily on a person who sets it up, and the court should in the first instance be satisfied that what a party is seeking to carry out is clearly illegal or against public policy.¹¹

When facts which go to make a contract illegal come to the notice of the court, the doctrine of *pari delicto* will be given effect to and the court will refuse its aid to the party who has participated in the fraud and asked for relief.¹² But the plaintiff is not entitled to estop the defendant from showing the illegality of his own title.¹³ "The true test for determining whether or not the plaintiff and the defendant were in *pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he himself was a party".¹⁴ Once the court finds two parties are in *pari delicto* in a civil sense, no effect will be given to the claims of either party because the court will refuse to recognise the transactions between them *in toto*.¹⁵ An exchange of plots held by tenants at will is void, the parties being *pari delicto* the court will help neither party but let the estate remain where it falls.¹⁶ S. 23 does not entitle the plaintiff to recover the property after the object of an agreement, which is opposed to public policy, has been fulfilled.¹⁷ There are exceptional cases in which a man will be relieved of the consequences of an illegal contract. They fall into three classes: (a) where the illegal purpose has not yet been carried out; (b) where the plaintiff is not in *pari delicto* with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim. As to the plaintiff being less guilty, this may arise in three situations: (a) when the contract is made illegal by a statute in the interest of a class to which the plaintiff belongs; (b) when the plaintiff is induced to enter into the contract by fraud or coercion; (c) when the property or moneys have come into the hands of a person under a fiduciary duty to the plaintiff as the proceeds of an illegal transaction.¹⁸

10 *Shewsbury v. L. N. W. Ry. Co.*, 16 Beav. reld. to in *Gobindo v. Shyam*, 1 CLJ 85; see *Williams v. St. George's Harbour*, 2 DG & J 547, 558. 27 LJ Ch 691: 44 ER 1102.

11 *Nanna v. Nathamuni*, 122 IC 342; *Natla v. Puram*, 20 MLJ 337 cited; *Bakshi v. Nadu*, 1 CLJ 261; *Gopal v. Babu*, 107 IC 903. -

12 *Kalagara v. Kalagara*, 76 IC 845, 851.

13 *Shridhar v. Babaji*, 38 B 709, 715; *Raghavulu v. Adinarayana*, 32 M 323; *Holman v. Johnson*, 1 Cowp 341: (1775-1802) All ER Rep 98, reld. to.

14 *Taylor v. Chester*, (1861-73) All ER Rep 154: LR 4 QB 309, 314, cited in *Farmer's Mart v. Milne*, 1915 AC 106, 114; *M/s Anand Prakash v. Oswal Trading Agency*, AIR 1976 Del 24, 27-28.

15 *Joseph v. Joseph*, 98 IC 700; *Kandaswami v. Narayanswami*, 45 MLJ 551 even though the defendant did not raise the plea; *Desari v. Koppolu*, 128 IC 512.

16 *Bisheshwar v. Raohcha*, 61 IC 985.

17 *Ram v. Gobind*, 99 IC 782.

18 *Sita Ram v. Radha Bai*, AIR 1968 SC 534.

Where a contract is opposed to public policy, a party is not entitled to claim a refund of the part of the consideration money that was paid by him with full knowledge of the illegality of the contract.¹⁹ A person convicted of a criminal offence cannot have the assistance of a civil court to recover the amount of fine and costs or compensation for imprisonment.²⁰ A distinction however lies between a consideration which is void and a consideration which is illegal. If it be void the consideration fails, but the contract between the parties is not invalidated, so where one party has performed his part of such a contract it can be enforced against the other.¹ A guarantee given in respect of a debt which is void and not illegal is binding.² A party may recover from the sheriff any fee paid in excess of what the sheriff is entitled to in law.³ The illegality of the original transaction also vitiates a subsequent security arising out of it.⁴ An innocent party may avoid an executory contract as soon as he discovers its illegal purpose.⁵ "A person who has paid money under an agreement which is void as opposed to public policy may recover back the money so paid while the agreement is still unperformed, although he cannot do so afterwards".⁶ The court has power to work out the equities and place the parties upon terms.⁷ If an agreement is merely collateral to another which, though void, is not prohibited the collateral agreement may be enforced. If on the other hand, a collateral agreement is a part of a device to defeat what the law has actually prohibited it cannot be enforced. In other words, agreements collateral to prohibited contracts are not enforceable because a taint attaches to them making them also contrary to public policy. Where there is a contract between D and P that P should enter into forward contracts on behalf of D for the sale and purchase of oilseeds with third parties and such forward contracts are forbidden by special statute P cannot claim any commission from D for bringing about contract between D and third parties.⁸

"Though the contract is apparently valid in form or matter, extrinsic evidence is always admissible in variance of or in addition to the contract to show that the transaction is illegal and therefore void". This is also the law in India.⁹ "The facts showing illegality either by statute or by common law

19 *Desikachari v. Prayag*, (1938)2 MLJ 17.

20 *Leslie Ltd. v. Reliable Advertising Co.*, (1915)1 KB 652; (1914-15) All ER Rep 1068.

1 *Bank of Bengal v. Vyabhoj*, 16 B 618; *Abaji v. Trimbak*, 28 B 66.

2 *Re Coltman*, 19 Ch D 64; *Yorkshire Ry. v. Machure*, 19 Ch D 478; 51 LJ Ch 253.

3 *Dew v. Parsons*, 2 B & Ald 562; *Morgan v. Palmer*, 2 B & C 729; see *Temperance L. Fund v. Rose*, (1932)2 KB 522; (1932) All ER Rep 690.

4 *Geere v. Mare*, 33 LJ Ex 50, foling *Fisher v. Bridges*, 23 LJQB 276; 2 CLR 928 Ex Ch; *Haseldine v. Hosken*, (1933)1 KB 822; (1933) All ER Rep 1.

5 *Cowan v. Milbourn*, LR 2 Ex 230; 36 LJ Ex 124.

6 *Kahna v. Kahn*, 106 PR 1879, fold in *Jiwana v. Malak*, 53 IC 407, reld. to in *Bhan v. Kaka*, 149 IC 1028; *Amaresh Chandra v. K. M. D. N. Saraf*, AIR 1972 All 130.

7 *Asaram v. Ludheshwar*, 1938 N 335.

8 *Firm Pratabchand v. Firm Kotriko*, AIR 1975 SC 1223; see *Halsbury*, 4th ed. vol 9 paras 431, 432.

9 See S. 92. Evidence Act.

must be pleaded, but when the illegality appears from the plaintiff's own evidence, it is the duty of the court to take judicial notice of the fact and to give judgment for the defendant, though the illegality is not raised by the pleadings".¹⁰ Illegality in the performance of a valid contract may disable a person from suing on it if he participated in the illegality. In *Ashmore Ltd. v. Dawson Ltd.*,¹¹ the defendant agreeing to carry a heavy machine of the plaintiff used to the knowledge of the plaintiff a vehicle the laden weight of which with the machine exceeded the maximum weight permissible under the Traffic Rule. The machine was damaged on account of overloading. Held: the plaintiff was not entitled to recover damage as he participated in the illegality.

24. Agreements void, if considerations and objects unlawful in part.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustrations

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

The section.—The section declares a contract whose consideration or object is unlawful to be void. It states that even if a part of a consideration of a single object be illegal the entire contract will be void. A third case is possible, namely, where a single consideration supports several promises, some of which are illegal and the rest legal, and the suit is to enforce that part of the agreement which is legal and the consideration is not void. In such a case if the legal part can be severed from the rest of the contract it may be enforced.¹² Where the legal and the illegal objects cannot be separated, the whole transaction is void.¹³ Where there is one entire contract for a single consideration, the contract is not severable. If two documents be part and parcel of one transaction and one be tainted with illegality, the other becomes tainted with the same illegality and is void.¹⁴ The section has no application to promises which are offered in the alternative, such a case is expressly provided for in S. 58,¹⁵ or where the contract is severable as in S. 57.¹⁶ Where

¹⁰ *Hill v. Clarke*, 27 A 266.

¹¹ [1973]2 All ER 856 CA.

¹² *Sabitri v. Savi*, 145 IC 195; *Choonilal v. Nani*, 78 IC 278; *Bhola v. Mohammad*, 10 IC 465; *Poonoo v. Faaz*, 23 WR 66; *Ramaswamy v. Nachiappa*, 1940 R 45; *Saundatti v. Shripad*, 1933 B 132; *Gappao v. Har*, 1935 O 501; *Saran v. Dal*, 1938 L 579.

¹³ *Bhagwat v. Anandrao*, 86 IC 515; *Kathu v. Vishvanath*, 89 IC 199; *Satish v. Kashi*, 46 IC 418.

¹⁴ *Kashiram v. Barkya*, 77 IC 46.

¹⁵ *Mahadeo v. Mathura*, 29 ALJ 295.

¹⁶ *Vedakannu v. Nanguneri*, 1938 M 982.

a transaction consists of two separate considerations for two separate objects, the court can give effect to the lawful and reject the unlawful, unless the whole transaction is prohibited by statute or involves moral turpitude or offends against public policy.¹⁷ Where the sale of an office is prohibited, an agreement for its sale, being single and entire for a sum of money, is void.¹⁸ Where there is not one whole consideration for a number of transactions, if one went the others could be given effect to.¹⁹

The holder of a bill or cheque cannot recover on the instrument if any part of the consideration be illegal. But the rule of disability in cases of partial failure of consideration as contrasted with illegal consideration has long been recognised as between immediate parties to bills, notes and cheques. There is no inherent difficulty in separating the several considerations of a bill of exchange or cheque in proper cases.²⁰ A bill of exchange, part of the consideration of which is declared illegal by statute, is void, as the security (the bill) is entire and cannot be apportioned.¹ Where one of several considerations moving from a promisor is unlawful, *e.g.*, the transfer of property which the law does not permit to be transferred, the whole agreement is void.² But where a contract for the supply of goods is not a consideration or object of the contract of purchase of shares, the illegality of the former contract will not affect the latter. The former contract may have supplied the motive for the latter, but motive is essentially different from consideration and object.³ Where it cannot be ascertained how much of the alleged consideration of a promissory note represents losses incurred in gambling debts and how much represents money actually borrowed, no suit will lie to recover on the notes.⁴ A consideration that proceeds upon the withdrawal of criminal proceedings that have been instituted is illegal; even if this illegal consideration is only a part of the consideration of another agreement it renders the whole of that agreement void.⁵ Where the consideration of the services of a pleader in a case was Rs. 500 and the gift of some property in suit, which latter was illegal, the agreement being one and indivisible, the pleader could recover nothing under the contract.⁶ If an agreement to compound a non-compoundable offence be part of a consideration for reference to arbitration and a security by way of mortgage, the security cannot be enforced.⁷ If the terms of a *ganja* licence prohibit the licensee to admit partners without the written permission of the collector, and

17 *Asram v. Ludheswar*, 1938 N 335.

18 *Hopkins v. Prescott*, 4 CB 578; 16 LJ CP 259.

19 *Madho v. Official Assignee*, 1950 FC 21.

20 *Robinson v. Marsh*, (1921) 2 KB 640; 90 LJ KB 1317.

1 *Scott v. Gillmore*, 3 Taunt 226; 128 ER 90.

2 *Shiam v. Dilganjan*, 39 IC 540; *Joseph v. Joseph*, 98 IC 700; but see *Ahmad v. Riyasat*, 1935 A 862; *Ma Kyn v. Ong*, 167 IC 707.

3 *Re Dehra Dun E. T. Co.*, 52 A 406, 412; *Mohammad v. Satyendra*, 59 CLJ 383.

4 *Balgobind v. Bhaggu Mal*, 35 A 558.

5 *Srirangachariar v. Ramasami*, 18 M 189; *Lornd v. Grimwade*, 39 Ch D 605; 57 LJ Ch 725.

6 *Kathu v. Vishwanath*, 49 B 619.

7 *Sudhendra v. Ganesh*, (1939) 1 C 241; see *Bhowanipore B. Corp. v. Durgesh*, 45 CWN 1.

the plaintiff without such permission entered into partnership with the licensee and advanced money as part capital for two contracts, opium and *ganja*, it being impossible to separate the contracts and the purpose of the partnership being in part illegal, the whole suit must fail.⁸ Where the parties have treated two debts, one void and the other valid, as a lump sum, the contract must be regarded as an integral one and void in its entirety. If however the void part can be separated from the rest then the latter cannot be invalidated.⁹ When an agreement to sell land belonging to a minor was not binding, this did not invalidate a promise to pay damages for failure to convey.¹⁰ Where the assured person commits suicide, as the committing of suicide is not a crime in British India, the descendants of the assured are entitled to recover the sum assured.¹¹

The section does not apply to transfers under the Transfer of Property Act.¹² The section is not applicagle to transfers of immovable property. Therefore, if a non-transferable interest is included among other transferable property, the whole transaction is not illegal.¹³ The contrary view has found support in several cases.¹⁴ In some cases the legal part has been held not to be affected by the illegal part on the ground of the promises being distinct and severable.¹⁵ Where, by a *kabulyat*, the defendant agreed to pay to the plaintiff rent at an enhanced rate in excess of that permitted by the Bengal Tenancy Act, the whole agreement has been held to be void, the court refusing to sanction the enhancement up to the statutory limit.¹⁶ As has been said in *Baker v. Hedgecock*,¹⁷ the court cannot create or carve out a new covenant for the sake of validating an instrument which would otherwise be void. Where certain mortgage covenants were void, being forbidden by the provisions of the Agra Tenancy Act, the personal covenants fell along with the contract of mortgage and the entire contract was held void.¹⁸ The plaintiff in such cases may, however, recover the money he has advanced to the defendant,¹⁹ but in *Gouri Dutt v. Bandhu*,²⁰ it has been pointed out that a transfer of an occupancy holding

8 *Gopalrao v. Kallappa*, 3 Bom LR 164.

9 *Davlatsingh v. Pandu*, 9 B 176.

10 *Kumara Thevan v. Karuthayee*, 4 IC 1129.

11 *Tej v. Ram*, 19 Lah 511; *N. I. Insce. Co. v. Kanhaya*, 19 L 542.

12 *Gappoo v. Harcharan*, 158 IC 267.

13 *Dip Narain v. Nageshar*, 28 ALJ 45 FB; *Raghunath v. Lachman*, 154 IC 49.

14 *Khurshed v. Wazirunnissa*, 6 IC 857; *Ram v. Ram*, 18 IC 9; *Sheo Narain v. Rajkumar*, 27 ALJ 479.

15 *Muhammad v. Muhammad*, 31 ALJ 1522; *Purna v. Gopendra*, 91 IC 517; per contra *Dasrath v. Sandala*, 93 IC 310; *Sheo Narain v. Rajkumar*, 27 ALJ 479; see *Bhagwat v. Anandrao*, 86 IC 515; *Kathu v. Vishvanath*, 89 IC 199; *Uman v. Sitara*, 33 ALJ 339.

16 *Kristodhone v. Brojo*, 24 C 895.

17 39 Ch D 520.

18 *Harprasad v. Sheo Gobind*, 44 A 486; *Jarbandhan v. Badri Narain*, 45 A 621; *Sital v. Ram*, 47 A 780; *Sheonarain v. Rajkumar*, 27 ALJ 479, but see *Muhammad v. Muhammad*, 31 ALJ 1822, see ante; *Mirdad v. Ramzan*, 40 A 449.

19 *Uman v. Sitarakhan*, 157 IC 1096.

20 119 IC 505; *Rajendra v. Ram*, 39 A 539; see *Dip Narain v. Nageshar*, 28 ALJ

by mortgage, like a transfer by a minor, is not unlawful but is merely inoperative, therefore the entire contract does not become void.

25. An agreement made without consideration is void unless—

(1) Agreement without consideration void unless it is in writing and registered.—it is expressed in writing and registered under the law for the time being in force for the registration of [documents,]* and is made on account of natural love and affection between parties standing in a near relation to each other, or unless

(2) or is a promise to compensate for something done.—it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless

(3) or is a promise to pay a debt, barred by limitation law.—it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

* This word was substituted for the word "assurances" by s. 2 and Sch. II of the Amending Act, 1891, (XII of 1891).

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the court should take into account in considering whether or not A's consent was freely given.

1. The section.—The section begins by reciting that an agreement made without consideration is void. That is the general rule laid down, then follow three cases in which agreements made without consideration are nevertheless contracts. It has become the established practice of the courts in India, in cases of contracts, to require satisfactory proof that consideration has been actually received according to the terms of the contract; it has never been held that a contract made under seal, of itself, imports that there is sufficient consideration for the agreement as is the case in English law.¹ Accordingly, a mortgage² or sale³ effected by a duly registered deed has been held to be void for want of consideration. A holder in due course is entitled to recover on a negotiable instrument drawn for no consideration.⁴

2. Sub-section (1).—A promise made by a person to pay his brother's debts is founded not on valuable consideration but on good consideration, namely, love and affection, and is binding if made by a registered document though unsigned.⁵ A gift to a daughter who was looking after her father, nursing and tending him, is a transaction which comes within provisos (1) and (2) to the section.⁶ Where a member of an undivided family, governed by the Mitakshara law, by a registered document renounces all rights to the family property in favour of the others who were to manage the estate in future, the agreement not having been executed for natural love and affection was void.⁷ The section is intended to give effect to agreements which would otherwise be void for want of consideration,⁸ but not to agreements which are not gifts when the instruments embodying the agreements are void, for example, under S. 28.⁹

Post-nuptial contracts which are registered are not a mere nullity if made on account of natural love and affection.¹⁰ Where it is obvious that no natural love or affection existed between a husband and a wife, an agreement between

1 *Kaliprasad v. Raja Sahib Prahlad*, 2 BLRPC 120, 122.

2 *Manna Lal v. Bank of Bengal*, 1 A 309.

3 *Tatia v. Babaji*, 20 B 176; Farran C. J. dubitante drawing a distinction between a perfected conveyance and a contract.

4 *Jethmal v. Hari*, 1949 As 6.

5 *Venkatasamy v. Rangasamy*, 13 MLJ 428; *Lala v. Jang*, 1937 O 254.

6 *Saroj v. Jnanada*, 36 CWN 555.

7 *Appa v. Ranga*, 6 M 71.

8 *Ram v. Basant*, 64 IC 121.

9 *Saroj v. Jnanada*, 36 CWN 555.

10 *Poonce Bibee v. Fyz*, 15 BLR appdx. 5.

them, for example, a promise by the husband to provide maintenance to the wife, cannot be supported.¹¹

3. **Is made.**—These words are not to be regarded as equivalent to “is expressed to be made.” Although, therefore, the recital in a deed may contain no reference to the existence of natural love and affection, the court may find it established on the evidence that the disposition was made on account of such love and affection.¹²

4. **Standing in a near relation.**—The meaning of these words should not be narrowed down to imply “mere relatives”. There are many instances in which persons who are not relatives within the meaning of the law nevertheless stand in a near relation to one another. Thus, the parents of a (Muhammadian) woman have been held to be relatives of her husband.¹³ A person and his father-in-law's divided brother's widow are not persons standing in near relation to each other.¹⁴

5. **Sub-section (2).**—This sub-section lays down an exception to the general rule that a promise made without consideration is void.¹⁵ A promise to pay what one is already under an obligation to pay is a promise without consideration. It can give rise to no cause of action unless the promise falls under this sub-section.¹⁶ The Act, though in the main founded on English case law, does not follow the present English law on the subject of consideration.¹⁷ To bring a case within the provisions of this sub-section it must be shown that what was voluntarily done by the plaintiff was done “for the promisor” or was “something which the promisor was legally compellable to do.” Thus where a plaintiff established a market to please the collector and not at the desire of the defendant, the expenditure incurred by the plaintiff in establishing the market was not a consideration for the agreement by the defendant promising to pay a certain commission to the plaintiff on the price of articles brought for sale in the market, the promise, therefore, was void.¹⁸ Past services can form legal considerations under this sub-section when the services have been rendered to a person in existence. Accordingly, a company is not bound by the contracts contained in the memorandum and articles of association, which bind the shareholders *inter se* and possibly the shareholders and directors but not the company and its promoters.¹⁹ A moral obligation to pay a debt, the benefit of which has been enjoyed jointly with another, furnishes good consideration for its acknowledgment after the death of a joint debtor.²⁰

11 *Mrs. X. v. Mr. X.*, 98 IC 217; *Raj Lukhy v. Bhoothnath*, 4 CWN 488 (promise by registered deed).

12 *Nisar Ahmed v. Rahmat*, 100 IC 350.

13 *Nisar v. Rahmat*, 100 IC 350.

14 *Taranata v. Gopala*, 1943 M 591.

15 *Sri Mahadeo v. Baldeo*, 1943 O 89.

16 *Madan v. Mukherji*, 39 IC 919; *Venkatagiri v. Krishnayya*, 1948 PC 150.

17 *Sindha v. Abraham*, 20 B 755.

18 *Durga v. Baldeo*, 3 A 221.

19 *Ahmedabad Jubilee S. & W. Co. v. Chhatalal*, 10 Bom LR 141.

20 *Sadaram v. Sahasada*, 154 IC 668.

An infant's promise being void a promissory note executed in renewal of such a promise is without consideration.¹ Similarly, it has been held that a consideration received by a person during his minority cannot support a consideration for a promise by him after he has attained majority. Under this sub-section it has been pointed out that past consideration may be a good consideration, but that past consideration must be an existing and a valid one.² On the contrary, it has been held by the High Courts of Punjab,³ of Calcutta,⁴ and of Bombay,⁵ that a promise to compensate wholly or in part for past services rendered during minority falls within the purview of this sub-section and is therefore binding. The English law under the Infants' Relief Act, 1874, is however different. A promise to reward for future services stands on a different footing and unless supported by consideration such an agreement is not binding.⁶

6. **Voluntarily.**—The word 'voluntarily' must necessarily exclude anything done at the request of the promisor. As has been pointed out in *Sindha v. Abraham*,⁷ services at the desire of the promisor already rendered and such services to be rendered are placed in S. 2(d) upon the same footing, either will constitute a good consideration for a definite agreement. If the services were rendered without the desire of the defendant the case falls within this section. The services will have been then voluntarily rendered for the defendant. The section appears to cover cases where a person without the knowledge of the promisor or otherwise than at his request does the latter some service and the promisor undertakes to recompense him for it. In such a case the promise does not need a consideration to support it. Where certain services were rendered by a pleader on request, and in pursuance of an agreement to pay a certain remuneration, the services rendered not being voluntary, the agreement could not be treated as a promise to compensate under this section.⁸

7. **Sub-section (3).**—The words of this sub-section imply that the person making the promise is the person against whom the liability might have been enforced; if that is the case, a promise made by a person who is under no obligation to pay the debts of another, even though they are time barred, is clearly not within the exception to the general rule. A promissory note executed by a widow in her personal capacity in payment of time barred debts of her husband cannot be brought within the section. An executor or administrator can do what the deceased could have done, it is open to the former therefore to make a promise to pay a time barred debt and the promise

1 *Indran v. Anthappa*, 16 MLJ 422.

2 *Suraj v. Sukhu*, 51 A 164 Allahabad.

3 *Karmchand v. Basant*, 11 IC 321; *Prabhudial v. Shambhu*, 54 IC 436; *Govind v. Piran*, 1935 L 561 FB; *Ram Ratan v. Basant*, 2 Lah 263; *Ferozedin v. Ghulam*, 89 IC 434; but see *Nazvi v. Jiwan*, 1938 L 159.

4 *Kundan Bibi v. Sree Narayan*, 11 CWN 135.

5 *Sindha v. Abraham*, 20 B 775. See s. 11 note.

6 *Basant v. Madan*, 46 IC 282; *Hulse v. Hulse*, 25 LJCP 177: 139 ER 1256.

7 2 B 755, fold in *Sabava v. Yamanappa*, 35 Bom LR 345.

8 *Kali Pada v. Durga Das*, 27 CWN 789.

will be binding.⁹ If a debtor applies to a bank for a loan for repayment of the dues of the creditor, the application cannot be regarded as a promise to pay the creditor within the meaning of Sec. 25(3).¹⁰ When a promise falls under sub-section (3) it constitutes a valid agreement for the purpose of suing, whether there is a fresh consideration for the promise or not, whether the debts covered thereby are within limitation or not.¹¹ It is open to a Hindu father or grandfather to pass a promissory note for his son or grandson which will be liable to the extent of the assets of the ancestor coming to the hands of the heir.¹² The general rule is that a consideration merely moral is not a valuable consideration such as would support a promise.¹³ But there are some instances of promises which it was formerly usual to refer to the now exploded principle of previous moral obligation and which are still held to be binding. Amongst those instances is a promise after full age to pay a debt contracted during infancy and a promise in writing in renewal of a debt barred by the law of limitation. The efficacy of such promises is now referred to the principle that a person may renounce a benefit of a law made for his own protection.¹⁴ Even a time barred debt is a good consideration to validate a sale¹⁵ or a mortgage.¹⁶ The words 'limitation of suits' do not mean merely a bar on suits, but mean the limitation of time as prescribed by the law of limitation in force with regard to actions, including applications. Where a mortgage was executed in lieu of an amount due on an earlier bond, a suit on which bond had abated, the mortgage did not fall to the ground owing to the absence of consideration.¹⁷ S. 20 of the Limitation Act does not require the agent to be authorised in writing. An agent impliedly authorised will be 'duly' authorised within the meaning of the section.¹⁸ In an account stated it is immaterial if some of the items are time barred. If the whole account is time barred the ban imposed by cl. 3 will apply.¹⁹ This clause has no application to a case where a debt is not binding on the minor and is not enforceable against him. Sale of jewels pledged by the borrower (guardian of a minor) and appropriation of the proceeds by the lender is not payment within the meaning of S. 20 of the Limitation Act, as that section requires the payment to be made by the debtor or his agent.²⁰ A *de facto* guardian has no authority to renew a time barred debt.¹ An offer to pay a barred debt, if refused, cannot be made the basis

9 *Pestonji v. Meherbai*, 112 IC 740.

10 *H. K. D. Setty v. Vedvathamma*, AIR 1972 Mys 283, 285-6.

11 *Kishen v. Gohli*, 1938 L 757; *Kapaleeswarar v. T. Tirunavkarsu*, AIR 1975 Mad 164.

12 *Champak v. Raya*, 1932 B 522.

13 *Eastwood v. Kenyon*, 11 A & E 438: (1835-42) All ER Rep 133. *Beaumont v. Reeve*, 15 LJQB 141.

14 *Tilakchand v. Jitamal*, 10 Bom HCR 206, 214; *Heather v. Webb*, 2 CPD 1.

15 *Baldeo v. Puttu*, 21 IC 69.

16 *Jethibai v. Putlibai*, 14 Bom LR 1020.

17 *Niaz v. Parshotam*, 53 A 374.

18 *Birijmohun v. Rudra*, 17 C 944, 950.

19 *Ganesh v. Rambati*, 1942 N 92.

20 *Vaiyappa v. Maruda*, 152 IC 299.

1 *Narottam v. Chitta*, 1939 B. 464; *Nagarmal v. Bajrang*, 1950 PC 15.

of a claim.² The words 'person to be charged', are not confined in their application to the debtor only.³

In order to satisfy the requirements of this sub-section it is sufficient that the document is in writing and signed by the person to be charged; that it refers to the debt—not necessarily to the fact that the debt is no longer recoverable owing to the law of limitations—but in such a way as to identify the debt; that it contains a promise to pay wholly, or in part, the debt referred to therein, i.e., it expresses an intention to pay which can be construed to be a promise within the meaning of the section. It is not necessary that there should be an accepted proposal reduced into writing.⁴ The giving of a promissory note so as to constitute a new promise under sub-section (3) cannot alter the pre-existing cause of action, though it gives rise to a new one.⁵ The promissory note must be properly stamped.⁶ According to the sub-section, the old debt is not revived, but it is considered to be a good consideration for the promise to pay, and this new promise is the measure of the creditor's right. This promise may be absolute or conditional. If it is absolute, if there is no "but" or "if", it will support a suit without anything else: if it is conditional, the condition must be performed before a suit upon it can be decreed. If the debtor says, "I will pay when I can," the creditor must prove his ability to pay,⁷ if he says, "I will pay by a set-off or some special arrangement", the creditor can realise his dues in no other way.⁸

There is some authority for the view that it is not necessary specifically to refer to the previous time barred debt, so long as it can be ascertained that there is a promise in writing to pay such debt.⁹ It is not necessary to recite the details of the loan or to state that the promise is to pay a debt which is already barred. Oral evidence is admissible to connect the express promise to pay with the previous loan.¹⁰ On the other hand, there are some observations in other cases which support the contrary view.¹¹ Where there is nothing but a mere promise to pay a time barred debt, then unless that promise is in writing and signed by the person to be charged therewith, it would not form a good consideration. Where, however, there is not merely a promise to pay a time barred debt but there is a novation of contract under which fresh consideration passes from the promisee, and there is on the part of the promisor the receipt of such consideration as well as a promise to pay a time barred debt, the two taken together would amount to a valid agreement, although the previous

2 *Soore v. Yalavarthi*, 1946 M 72.

3 *Puliyath v. Parekh*, 1940 M 678.

4 *Varadaraja v. Suryaprakasha*, 9 MLJ 330; *Kastur v. Maneck*, 1943 B 447.

5 *Smith v. Heptonstall*, (1938) 1 Rang 6.

6 *Bhagwan v. Prag*, 1933 O 18.

7 See *Tanner v. Smart*, 6 B & C 603; *Watson v. Yates*, 11 B 580.

8 *Bindae v. Chota*, 16 CWN 686, see English authorities refd. to; *Ramaswami v. Anthappa*, 16 MLJ 422; *Maniram v. Rupchand*, 33 C 1047 PC; *Ballapragada v. Thamma*, 40 M 701.

9 *Ganapathy v. Muniswami*, 33 M 159.

10 *Nath v. Durga*, 58 A 382; *Ghulam v. Fasihunnisa*, 57 A 434.

11 *Appa v. Suryaprakasa*, 23 M 94.

debt had been barred by time. This would be particularly so where it is clear that the creditor would not have advanced further consideration unless a promise to pay the time barred debt had also been made.¹² A letter to the following effect cannot be construed as a promise to pay: "I could not go over to you because I was unable to secure money. As you people will ask me I will pay your money accordingly. I would not specify by saying that I would pay so much".¹³

8. Of which the creditor might have enforced payment.—These words are meant to cover the case of a person who would be liable to pay but for the limitation barring the suit. Therefore, sons would be liable to pay a time barred debt of their father, if they agree to do so, only to the extent of the family property received by them. Any agreement to pay personally would be without consideration.¹⁴ It is open to a guardian of a minor to make a promise to pay a barred debt.¹⁵ Where a joint family consists of major and minor brothers, the alienation of the joint ancestral property during the minority of some of the members of the family by a manager for payment of a time barred debt due from their deceased father is unjustified, as being neither for the benefit of the family nor supported by legal necessity.¹⁶ A statement by a pleader in court that his client, the debtor, had no objection to pay the money claimed by the plaintiff is not covered by this section as the pleader was not generally or specifically authorised to represent his client for the purpose of making a fresh contract under this section.¹⁷ The Deputy Commissioner acting on behalf of the Court of Wards is not an agent authorised to pay a time barred debt.¹⁸ Where a bond is not recoverable, no suit would lie on a promissory note executed in lieu of the bond after it had become time barred, as the debt under the bond was not one which the plaintiff might have enforced but for the law of limitation.¹⁹

9. Promise to pay.—Under this section there must be an express promise in writing to pay a barred debt. An unconditional acknowledgment of a debt which is barred, though it may amount to an implied promise to pay, cannot revive the debt under the section and enable the creditor to sue upon it,²⁰

12 *Nath v. Durga*, 58 A 382; see *Bindeshri v. Sarju*, 21 ALJ 446; see *Shamlal v. Gulab*, 159 IC 447 cited below; *Debi v. Bhagwati*, 1943 A 63; *Srirama v. S. of S.*, 1943, M 85 FB.

13 *Gourinnissa v. S. J. Kirmani*, AIR 1974 Mad 191, 193.

14 *Asaram v. Karam*, 51 A 983; see *Pestonji v. Meherbai*, 112 IC 740 refd. to ante; *Abani v. Kanti*, 38 CWN 253; *Nazvi v. Jiwan*, 1938 L 159.

15 *Manikya v. Pushpa*, 115 IC 263; see *Nandram v. Ranchoddas*, 54, IC 716 (minor can ratify a contract entered into by his guardian).

16 *Gunni v. Dalchand*, 133 IC 419, 423.

17 *Bansidhar v. Babulal*, 75 IC 309.

18 *Anand v. Dy. Commr.*, 1940 O 107.

19 *Mohammad v. Raja Ram*, 167 IC 919.

20 *Ramaswami v. Kuppusami*, 20 MLJ 656; *Ram v. Damodar*, 6 Pat LJ 121; *Panchanun v. Kshitish*, 67 IC 298; *Maganlal v. Amirchand*, 52 B 521; *Davindar v. Lachhmi Devi*, 12 Lah 239; *Gobind v. Sarju*, 30 A 268; *Kesar v. Sant*, 169 IC 608; *Balkrishna v. Jayshankar*, 40 Bom LR 1010; *Ganga v. Ram*, 23 A 502; *Barumal v. Daulatram*, 161 IC 703; *Debi v. Bhagwati*, 1943 A 63.

e.g., an entry in a book of account by one of the parties is not sufficient;¹ nor an oral promise to pay.^{1a} An implied promise is not sufficient.² The promise cannot be inferred from an acknowledgment which contains no express promise to pay a time barred debt, in other words, an implied promise to pay is not sufficient.³ A promissory note to pay an unbarred debt cannot be treated as a promise to pay a barred debt if there be two debts, nor can a promise to pay an imaginary debt be so treated.⁴ The words "Rs. 375 have been found due including interest" have been construed as merely an implied, as opposed to an express, promise to pay and therefore do not fall under this section.⁵ An unstamped debt containing a promise to pay interest has been held to be evidence of a fresh transaction and not mere acknowledgment.⁶ Under the English law an implied promise to pay will afford a *terminus quo* for a suit on the debt, but under the Indian law the promise must be an express promise. A *mablagbandi* is a good acknowledgment under S. 19 of the Limitation Act, therefore it preserves any debt which is not barred but is not a promise to pay under S. 25 so as to revive a debt which is barred.⁷ Of course, an unconditional promise to pay a barred debt is enforceable.⁸ A promise to pay a part of a barred debt is not a promise to pay the whole.⁹ A balance struck by a debtor in the creditor's book promising to pay interest,¹⁰ or writing such words as 'amount payable' or 'to be paid' or 'to be taken or given',¹¹ is more than a mere acknowledgment of a pre-existing debt and amounts to a promise to pay, so that even if the debt be time barred the promise would be enforceable. A promise to pay, if it be not absolute but qualified in its terms, *e.g.*, in a particular manner or out of a particular fund, will not be binding, even if made by deed.¹² Where a debt is not time barred, an unconditional acknowledgment, implying as it does a promise to pay, may both serve to extend limitation under S. 19 of the Limitation Act and may be the basis for a suit as giving a fresh cause of action. But where a debt is already timebarred, it cannot be

1 *Raj Narain v. Ramsarup*, 123 IC 820.

1a *Nath Sah v. Durga Sah*, 58 A 382; *Gulam v. Fasihunnissa*, 57 A 434; *Bashesar v. Baij*, 1938 L 264.

2 *Ram v. Anand*, 1938 N 180.

3 *Maganlal v. Amirchand*, 52 B 521; *Ghulam v. Fasihunnissa*, 57 A 434; *Gobind v. Sarju*, 30 A 268; *Chowksi v. Chowksi*, 8 B 194; *Debi v. Ram*, 19 CLJ 263; *Raj Narain v. Ram*, 28 ALJ 552, 556. See *Prahlad v. Bhagwan*, 49 A 496; *Suraiya v. Hamid*, 1949 O 48; *Madho v. Gauri*, 183 IC 179.

4 *Nur v. Tamujuddin*, 1941 C 449.

5 *Shamlal v. Gulab*, 159 IC 447 refing to *Girdhari v. Bishun*, 54 A 506; *Ram v. Karam*, 1938 L 155.

6 *Ram v. Sheo*, 1933 A 179.

7 *Sasikanta v. Sonaula*, 57 C 394; see *Nandlal v. Partab*, 69 IC 502; *Ram v. Anandi*, 1938 N 180.

8 *Simon v. Arogiasami*, 25 IC 361.

9 *Puliyath v. Parekh*, 1940 M 678.

10 *Gopi v. Singh*, 122 IC 238; *Tirkha v. Risak*, 8 IC 811; *Bhola v. Nanak*, 8 IC 575; *Mihim Lal v. Dairy Farm*, 182 IC 420; *Shanti v. Harnam*, 1938 L 234 FB.

11 *Fateh v. Surja*, 1939 L 486, but see *Jyoti Raham*, 1939 L 466.

12 *Ram v. Odindra*, 15 CLJ 17.

held that a mere acknowledgment, however unconditional, amounts to an express promise to pay. Sub-section (3) requires the promise to be in writing, which means not that the words 'I promise to pay should occur in writing, but does mean that the words, read as a whole, should by themselves express a promise to pay.¹³ Whether words in an entry imply a promise to pay is a question of fact.¹⁴

Where referring to the arrears of rent a tenant wrote, "I shall send by the end of Vysakha month", held, the document contained all the ingredients required by this sub-section.¹⁵ A letter containing a promise to pay a time barred debt is itself an agreement enforceable in law and can form the basis of a fresh cause of action.¹⁶ A collector as agent of the Court of Wards has no authority to bind a ward by a promise to pay a debt which is barred by limitation.¹⁷ A promise by an insolvent without fresh consideration to pay a debt, in respect of which the insolvent has obtained his discharge, is a promise made without consideration. Such a promise is not one contemplated by this sub-section.¹⁸ A mortgage by a *karnavan* in payment of a barred decretal debt is not binding on the *tarwad*.¹⁹

10. Limitation Act, S. 19 and sub-section (3).—The question whether an unconditional acknowledgment implies a promise to pay and affords a new cause of action to the obligee has been elaborately discussed and divergent opinions have been expressed. The distinction between section 19 of the Limitation Act and this sub-section is obviously this that under both a duly written and signed promise to pay a debt is necessary; but under this section the promise may be made before or after the expiry of the period of limitation. In the case covered by the Limitation Act the acknowledgment is utterly useless unless it is made before the expiration of the prescribed period.²⁰ In *Maniram v. Seth Rupchand*,¹ it was held by the Privy Council that an unconditional acknowledgment of a debt imports a promise to pay. That case, however, dealt with an acknowledgment made within limitation. Sub-sec. (3) applies when the debt is time-barred. There seems to be practically a consensus of opinion that a mere implied promise, such as is conveyed by an unconditional acknowledgment, is not sufficient for the purposes of the sub-section.² It must be signed by the party to be charged. It is not necessary that it should be

13 *Chela v. Official Receiver*, 18 Lah 562.

14 *Sohan v. Arya Sabha*, 1935 L 877.

15 *Appa Rao v. Suryaprakasa*, 23 M 94, fold in *Clark v. Grimshaw*, 73 IC 652.

16 *Maidens Hotel v. Willmott*, 161 IC 293, 1935 L 984.

17 *Suryanarayan v. Narendra*, 19 M 255.

18 *Naoroji v. Sidick*, 20 B 636.

19 *Mankoottil v. Komappan*, 44 IC 572.

20 *Abdul v. Bhajan*, 30 ALJ 77; *Girdhari v. Bishun*, 30 ALJ 279; *Chela v. Official Receiver*, 18 Lah 562; *Kapaleeswarar Temple v. T. Tirunavukarsu*, AIR 1975 Mad 164, 167.

1 33 Cal 1047 PC.

2 *Kesar v. Sant*, 18 Lah 234 refing to *Abdul v. Bhajan*, 63 A 963; *Ghulam v. Fasihunnissa*, 57 A 434; *Satya v. Ramesh*, 60 C 714; *Mukhi v. Gul*, 1933 L 209; *Baru v. Daulat*, 1936 L 164; *Tulsiram v. Zaboo*, 1949 N 215.

addressed to the party to be charged. The admission of liability may be unqualified or qualified by a condition which is fulfilled. The acknowledgment may be express or be one from which an absolute promise to pay may be inferred.⁸ An acknowledgment made after a suit has become barred is no good unless the acknowledgment amounts to an independent promise to pay.⁴ The acknowledgment may not be made to the creditor.⁵ The Privy Council in *Maniram v. Seth Rup Chand*⁶ has held that an unconditional acknowledgment made before the expiry of the period of limitation implies a promise to pay and therefore may form the basis of a suit.⁷ But a mere acknowledgment, though it implies a promise to pay, cannot be treated as a promise to pay a time barred debt, but something more is required to bring a case within sub-section (3).⁸ Of course, if no sum be due, unconditional acknowledgment would be ineffectual.⁹ The law is different from the English law on the subject, where, if there be an acknowledgment in writing which satisfies the Statute 9 Geo. 4 c. 14, there arises by implication of law a promise by the debtor to pay the debt,¹⁰ but that would not be sufficient under this sub-section which requires an express promise to pay. A promise to pay a debt cannot be inferred from the words, "I am quite willing to renew the note." A promise to renew a document is not a promise to renew a debt.¹¹ Whether a statement contained in a particular document is mere acknowledgment within the meaning of S. 19 of the Limitation Act, or whether it is promise to pay within the meaning of S. 25, must obviously depend upon the language of the instrument under consideration.¹² An acknowledgment to take the case out of the law

8 *Maniram v. Seth Rupchand*, 33 C 1047 PC; *Anup Singh v. Fateh Chand*, 42 A 575; *Raj Narain v. Ram Sarup*, 123 IC 820; *Parbuttinath v. Tejomoy*, 5 C 303; *Ramamurthy v. Gopayya*, 40 M 701; see *Narayanaswamy v. Gungadhara*, 37 MLJ 353; *Nathooobhai v. Ramatlal*, 23 Bom LR 1231; *Ramji v. Dharma*, 6 B 683; *Lalji v. Ghasiram*, 128 IC 276; *Allah v. Hanid*, 29 ALJ 56; *Janaka v. Sheocharan*, 135 IC 390; *Deoraj v. Indrasan*, 120 IC 470; *Jesaram v. Lachman*, 130 IC 570 (case under Limitation Act).

4 *Ganga v. Ramdayal*, 23 A 502; *Ram v. Damodar*, 6 Pat LJ 121; *Deoraj v. Indrasan*, 8 Pat 706; *Mutsaddi Lal v. B. B. C. I. Ry. Co.*, 42 A 390; *Chunilal v. Laxman*, 46 B 24; *Fadailal v. Roopchand*, 106 IC 661; *Mantajuddin v. Nazar*, 63 C 759; *Madho v. Gowri*, 1939 P 323.

5 *Rakki v. Nataraja*, 1932 M 219.

6 33 IA 165, fold in *Sitaram v. Nandaram*, 78 IC 234; *Chunilal v. Laxman*, 46 B 24.

7 *Gopal v. Ramnath*, 124 IC 624; *Om v. Haji Abdul*, 117 IC 377; *Kahan v. Dayaram*, 10 Lah 745.

8 *Babulal v. Badridas*, 124 IC 243; *Ram v. Damodar*, 60 IC 514; *Panchanan v. Khatish*, 67 IC 298; *Ganesh v. Mallu*, 131 IC 867; *Maniram v. Rupchand*, 33 IA 165 was a case under Limitation Act; *Kanailal v. Babulal*, 129 IC 95; *Mukhi v. Gul*, 141 IC 617; *Abdul v. Bhajan*, 53 A 963; *Girdhari v. Bishun*, 54 A 506; *Magunlal v. Amirchand*, 52 B 521, 527; *Satyaketu v. Ramesh*, 60 C 714, 37 CWN 326; *Balkdishna v. Debi*, 31 ALJ 1531.

9 *Mani v. Badri*, 1933 A 175.

10 See *Spencer v. Hemmerde*, 2 AC 507, 537.

11 *Satyaketu v. Ramesh*, 60 C 714, 37 CWN 326.

12 *Prasanna v. Panaula*, 79 IC 77; *Ghulam v. Fasihunnissa*, 57 A 434.

of limitation must be either one from which an absolute promise to pay can be inferred; or secondly, an unconditional promise to pay the specified debt can be inferred; or thirdly, there must be a conditional promise to pay the debt and an evidence that the condition has been performed.¹³ The authorities show that the writing relied on should itself amount to an acknowledgment. In *Maniram v. Rupchand*,¹⁴ it has been said that even an admission that there was a mutual open and current account at a particular time amounted to a conditional acknowledgment of liability and implied a promise to pay, in case the balance on that account was found to be in favour of the other party.¹⁵ But in another case it has been said that a mere acknowledgment confirms the old debt and does not supersede it; therefore, the acknowledgment itself cannot be made the basis of a suit.¹⁶ A promissory note executed by a person to satisfy a decretal debt due from his father which became barred by limitation is a distinct promise to pay, but the liability of the son is limited to the extent of the father's assets that have come to his hands.¹⁷ Where a debtor borrows a fresh sum and makes up and signs an old account the transaction amounts to a new contract and is not merely an acknowledgment of an old debt.¹⁸ When a debtor writes to the creditor, "I promise to pay the balance as soon as I am able to arrange within a period of 6 months", he makes a promise within the meaning of the section.¹⁹

An adjustment of account may be used either as a revival of an original promise or as evidence of a new contract.²⁰ The words "balance due" have been held not of themselves to amount to a promise to pay.¹ The contents of a petition filed in court have been held not to amount to an acknowledgment, inasmuch as it did not specify the amount of liability. It is necessary that an acknowledgment should be made in a document to which the creditor is a party.² Where after striking a balance of account an entry was made containing a promise to pay interest, it constituted a fresh cause of action.³ An oral settlement of an account made after it has become barred does not constitute a fresh cause of action as the promise to pay is not in writing,⁴ but a verbal promise supported by consideration to pay a debt has been held to give rise to a new cause of action.⁵

It is not necessary under this sub-section to establish that at the time

³ *Phul Singh v. Bhograj*, 49 A 801.

⁴ 33 C 1047 PC.

⁵ *Nihalu v. Radhu*, 16 L 258.

⁶ *Balkrishna v. Debi*, 31 ALJ 1531; *Tulsiram v. Zaboo*, 1949 N 229.

⁷ *Abani v. Kanti*, 38 CWN 253.

⁸ *Muhammad v. Bhagwan*, 5 IC 418; *Vasudeo v. Ramkrishna*, 24 B 394; *Srirama v. S. of S.*, 1943 M 85 FB.

⁹ *Bharat N. Bank v. Bishan*, 135 IC 673.

¹⁰ *Ramji v. Dharma*, 6 B 683; *Chandraprasad v. Varajlal*, 8 Bom LR 644.

¹¹ *Ranohheddas v. Joychand*, 8 B 405.

¹² *Manikya v. Pushpa*, 115 IC 263.

¹³ *Bhagwan v. Munshi*, 41 IC 915.

¹⁴ *Asirvada v. Vedamuthu*, 86 IC 942.

¹⁵ *Ibrahim v. Lalit*, 50 C 974; *Shrinivas v. Raghunath*, 4 Bom LR 50.

when the promise was made by the debtor he knew that the debt which he promised to pay was wholly or in part a debt which had become barred.⁶

11. **Debt.**—A debt in this section means a sum payable in respect of a money demand recoverable by action, *i.e.*, an ascertained amount. Therefore, a promise to pay the sum which may be found due by the arbitrators on the taking of an account between the parties is not a debt within the meaning of the section.⁷ The term 'debt' means a sum of money due by one person to another which is actually payable at the time as well as a sum of money which is due though not actually payable then. It must be a perfected and absolute debt consisting of an ascertained sum. It can never mean a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen.⁸ The term includes a judgment debt.⁹ Servants' wages are a debt as also money due for goods sold in retail.¹⁰ There is some authority for the view that there need be no reference to a barred debt, it is enough if there is a reference to a debt. A party to a contract may prove that actual consideration was something different to that recited in the document itself and effect must be given to the real consideration. A promissory note purported to be executed for cash, but in reality for a barred debt, is a contract enforceable under this section.¹¹ Similarly it may be shown that a part of the consideration represented a past debt for rent and not future liability arising under the contract. It is not necessary under this section that the agreement should in terms refer to the barred debt.¹² When an I.O.U. given for a past debt was barred, promises to pay made in subsequent letters, coupled with forbearance to enforce a doubtful claim, made the contract enforceable.¹³

12. **Explanation 1.**—In the case of a gift it must be complete. Equity will not assist in completing an imperfect gift, though it is equally plain that equity will protect a donee, *e.g.*, by specific performance or by injunction, who by a valid gift has obtained the title to the enjoyment of the thing that has been given. Thus, where an annuity was granted by a deed, the effect of which was not to effect a transfer of interest but to create a sort of a charge only, there could be no specific performance in favour of a volunteer.¹⁴ A provision

6 *Bhowani v. Peari*, 18 CLJ 329; *Mati v. Baikantha*, 18 CLJ 269, notwithstanding the dictum in *Ramaswami v. Kuppusami*, 20 MLJ 656; *Varadaraja v. Suryaprakasa*, 9 MLJ 330.

7 *Doraisami v. Vaithilinga*, 40 M 31.

8 *Powri v. Shiwa*, 156 IC 487.

9 *Billings v. Uncovenanted Service Bank*, 3 A 781; *Heera Lal v. Dhunput*, 4 C 500; *Shripatray v. Govind*, 14 B 390.

10 *Nobin v. Kenny*, 5 WRSCC Refce. 3.

11 *Ganapathy v. Muniswami*, 33 M 159; per contra *Appa Rao v. Suryaprakasa*, 23 M 94; see *Nath Sah v. Durga Sah*, 58 A 382.

12 *Abdullakin v. Ne*, 7 Rang 292; *Sandhura v. Kehr*, 169 IC 228; *Smith v. Heptonstall*, 1938 R 134.

13 *Wilby v. Elgee*, LR 10 CP 497.

14 *Re Lucan*, 45 Ch D 470.

for payment of a monthly allowance by the father in favour of his daughter is not a gift actually made within the meaning of this Explanation.¹⁵ The rule laid down in this Explanation applies to a transaction between a donee and a person claiming through the donor. If the donor has the power of revocation, an exercise of the power cannot be inferred from the fact that the donor has conveyed the property to a stranger, an express act of revocation will at least be necessary.¹⁶

13. **Explanation 2.**—To constitute a contract it is enough if there is “a legal consideration, and of some value”.¹⁷ Any valuable consideration, however small, is enough, the court will not take upon itself to decide upon the adequacy of the consideration.¹⁸ Where the consideration is lawful the court cannot enter into the question of its adequacy,¹⁹ even if the consideration be executed.²⁰ An executory agreement may be enforced if what the plaintiff has agreed to do is either for the benefit of the defendant or to the prejudice of the plaintiff. The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced.¹ Thus, parting with a guarantee,² or delivery of a will of doubtful validity,³ has been held to be good consideration, the court has no concern with the adequacy or inadequacy of the price paid or promised for it. A nominal consideration however being expressed in a deed does not prevent the admission of evidence of the real consideration, provided such real consideration is not inconsistent with the deed.⁴ A contract to pay 21 s. weekly for selling oil in London has been held to be good consideration for a promise not to sell it for a year after the determination of the contract. It is not a hard bargain, which means in equity an unconscientious bargain, against which equity will give relief.⁵ When two contracts are entered into at the same time, it is difficult sometimes to determine the exact amount of consideration.⁶

Mere undervalue does not exclude a man from the category of a purchaser for valuable consideration without notice. “In purchases the question is not whether the consideration be adequate but whether it be valuable”.⁷ A small consideration may support an extensive promise; but where there is a promise to pay a certain sum, all being supposed to be due, if the consideration as to any part fail, the agreement is *nudum pactum*. Where a document imports consideration, it is not sufficient to plead that there was no consideration but

¹⁵ *Saroj v. Jnanada*, 36 CWN 555.

¹⁶ *Lal Mohamed v. Mrs Tha*, 30 IC 20.

¹⁷ *Hitchcock v. Coker*, 6 A & E 457; (1835-42) All ER Rep 452.

¹⁸ *Graveley v. Barnard*, LR 18 Eq 518; see illustrns. (f) and (g).

¹⁹ *Sheate v. Beale*, 11 A & E 983.

²⁰ *Taluk Board v. Senthia*, 1936 M 709.

¹ *Bolton v. Madden*, LR 9 QB 55.

² *Haigh v. Brooks*, 10 A & E 309, 320; (1835-42) All ER Rep 438.

³ *Smith v. Smith*, 32 LJCP 149; 143 ER 165.

⁴ *Re British & Foreign Cork Co.*, LR 1 Eq 281.

⁵ *Middleton v. Brown*, 47 LJ Ch 411, but see S. 27.

Kimber v. I. R. Commenss., (1926) 1 KB 132; (1935) All ER Rep 609.

⁷ *Bassett v. Newworthy*, 2 Wh & TLC; *Chitambar v. Krishnappa*, 26 B 543.

the circumstances which show that there was no consideration must be stated.⁸ A nominal consideration is a good consideration, but the distinction between good and valuable consideration is this that the good consideration makes the instrument good as between the parties, but a valuable consideration makes the conveyance good as against a subsequent purchaser.⁹ There is an equity which may be founded upon the gross inadequacy of consideration; but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.¹⁰ The inadequacy must be such as to shock the conscience of the court and amount in itself to be conclusive and decisive evidence of fraud. Inadequacy of consideration when found in conjunction with other circumstances, such as the suppression of true value of property, misrepresentation, fraud, oppression, urgent need for money, weakness of understanding or even ignorance, is an ingredient which weighs powerfully with a court of equity in considering whether it should set aside the contract or refuse to decree specific performance of it.¹¹ Want of consideration will not in itself defeat the title, but may go to show the deed to be the result of undue influence.¹² Where a contract for sale of land was made for a very inadequate consideration and without knowledge of all the circumstances connected with it, and without careful deliberation by a person lying on his death-bed, the court set aside the contract.¹³ A court of equity will set aside a sale, by a poor and ignorant man in distress for money, at a considerable undervalue, where he had no independent advice.¹⁴ Where according to the contract the price of an article or property is to be fixed by a valuer, this fact does not preclude the court from inquiring into the adequacy of the consideration; if the undervalue were such as to convince the court that the valuer had acted under fraud or mistake, the contract would be incapable of enforcement in equity.¹⁵

26. Agreement in restraint of marriage void.—Every agreement in restraint of the marriage of any person, other than a minor, is void.

Restraint of marriage.—In English law a condition in restraint of marriage is void; but it has frequently been decided that conditions in restraint of marriage limited as to time, as to place, and as to a person, are good notwithstanding the rule of the Civil Law.¹⁶ Partial restraints to be tolerated

⁸ *Forman v. Wright*, 20 LJCP 145.

⁹ *Gully v. Bishop of Exeter*, 10 B & C 584, 606.

¹⁰ *Tennent v. Tennent*, 2 Sc Ap 6, cited in *Adm. Genl. v. Juggeswar*, 3 C 192; *Kalimuthu v. Tha*, 14 R 392; *Santhappa v. Santhiraja*, (1938) 1 MLJ 676.

¹¹ *Kedari v. Atmarambhat*, 3 BHCRAJ 11; *Borell v. Dann*, 2 Hare 440, 450; *Falcke v. Grey*, 29 LJ Ch 28; 62 ER 250 see illust. (g).

¹² *Rashbehari v. Haripada*, 59 CLJ 387.

¹³ *Clark v. Malpas*, 31 Beav. 80.

¹⁴ *Fry v. Lane*, 40 Ch D 512: (1886-90) All ER Rep 1084.

¹⁵ *Hiralal v. Khairati*, 22 ALJ 76.

¹⁶ *Re Whiting's Settlement*, (1905) 1 Ch 96, 103; see *Re Hewett*, (1918) 1 Ch 458, 464: (1918-19) All ER Rep 530.

must be reasonable.¹⁷ Thus a condition that should a legatee marry a Scotchman,¹⁸ or a domestic servant,¹⁹ he or she would forfeit the legacy is a valid condition.²⁰ "There is a great difference between promising to marry a particular person and promising not to marry any one else" except the plaintiff. The latter is void as being in restraint of marriage.¹ Restraint of marriage is different from restraint on remarriage.²

The law laid down in the section is stricter than the English law as it does not admit of any exception in favour of partial restraints of a reasonable nature but declares every agreement operating in restraint to be void and unenforceable (compare S. 27). The sole exception recognised is regarding the restraint of the marriage of a minor. A contract affecting a major and restricting her right of marrying according to her own choice is void.³ A provision in a dower deed whereby a Mahomedan husband authorises his wife to divorce herself from him in the event of his marrying a second wife,⁴ or an antenuptial agreement by which the husband gives his wife the power of divorcing him and stipulates not to take any other wife,⁵ or an annuity granted to a woman on condition that she should not remarry anyone except a son of the grantor,⁶ is not void. Where a girl's father agreed to pay the expenses of education of his son-in-law but on condition that if the latter married another woman his father would repay the sum so spent, the condition was held to be in restraint of marriage, as the section is not restricted in its operation to the case of first marriage only.⁷ A wakf may be dedicated for the benefit of a person on condition that if the said person marries, the benefit of the wakf property is to be given to another. Such a condition does not offend against this section.⁸ A wagering contract for £50 that the plaintiff would not marry within six years is *prima facie* in restraint of marriage and void. The courts have always discountenanced bargains on the subject of marriage.⁹

27. Agreement in restraint of trade void.—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void.

17 *Re Lanyon*, (1927)2 Ch 264; (1927) All ER Rep 61; see *Tennent v. Tennent*, 2 HLJ 6 cited, in *Kalimuthu v. Maung Tha*, 14 R 392; *Rao v. Gulab*, 1942 A 351.

18 *Perrin v. Lyon*, 9 East 170.

19 *Jenner v. Turner*, 16 Ch D 188.

20 But see *Scott v. Tyler*, 1 Wh & TLC 9 Ed 464, 482: (1775-1802) All ER Rep 237.

1 *Lowe v. Peers*, 4 Burr 2225: (1558-1774) All ER Rep 364.

2 *Latafa v. Shaharb*, 1932 O 108.

3 *Shahazada v. Mahomed*, 148 IC 1051.

4 *Maharam v. Ayesha*, 19 CWN 1226, fold in *Badu v. Badarannessa*, 29 CLJ 230.

5 *Khalil v. Marian*, 59 IC 804.

6 *Muhammad v. Noor Jahan*, 10 ALJ 185.

7 *U Ga v. Hari*, 24 IC 777; *Nga Po v. Mi On*, 15 IC 915.

8 *Latafatunnisa v. Shaharband*, 139 IC 292.

9 *Hartley v. Rice*, 10 East 22: 103 ER 683.

Saving of agreement not to carry on business of which goodwill is sold.—Exception 1.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein; Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.¹⁰

1. **The section.**—The section provides that every agreement by which anyone is restrained for exercising a lawful profession, trade or business of any kind is to that extent void. To the general rule thus laid down three exceptions are specified, namely, the case of an agreement not to carry on business the goodwill of which is sold, the case of an agreement between partners prior to dissolution, and the case of an agreement between partners during the continuance of partnership. In *Madhub v. Rajcoomar*,¹¹ it was ruled that whether the restraint was general or partial, unqualified or qualified, if it was in the nature of a restraint of trade, it was void. This interpretation is plainly justified by the language used.¹² But a narrow construction has been put upon the section in some cases.¹³ This section was reproduced from S. 833 of the Draft Civil Code of the State of New York with the full knowledge that the effect would be to lay down a rule much narrower than what was recognised at the time by the common law of England. The rules of the common law, on the other hand, have since then been considerably widened and developed. The result is that the rule as embodied in this section presents an almost startling dissimilarity to the most modern phase of the English rule on this subject. In recent times, as laid down in *Nordenfelt v. Maxim Nordenfelt Gun Co.*,¹⁴ it has been ruled in England that contracts which impose unreasonable restraints upon the exercise of a business, trade or profession are void while those which impose reasonable restraints are valid.¹⁵ Sections 23 and 27 do not apply where a claim is founded upon a tort. A combination amongst the traders of a particular locality is not actionable *per se* merely because it brings profit to them and indirectly hurts a rival in trade. The section does not apply to such a case.¹⁶

The words “restrained from exercising a lawful profession, trade or business of any kind” do not mean an absolute restriction but are intended, as

10 Exceptions 2 and 3 were repealed by s. 73 and Sch. 11 of the Indian Partnership Act, 1932 (IX of 1932).

11 14 BLR 76.

12 As observed in *Brahmaputra Tea Co. v. Searth*, 11 C 545; *Nur Ali v. Abdul*, 19 C 765; *Cohen v. Wilkie*, 14 IC 215.

13 *Carlisle Nephew v. Ricknauth*, 8 C 809; *Mackenzie v. Strirmiah*, 13 M 472; *Municipal Committee v. Kalu*, 1944 N 73.

14 1894 AC 535; for the various stages in the growth of English law, see *Mitchell v. Reynolds*, 1 Sm LC 462, 13 Ed: (1558-1774) All ER Rep. 26.

15 *Shaikh Kalu v. Ram Saran*, 13 CWN 388.

16 *Bholanath v. Lachmi*, 53 A 316, 322, see the elaborate statement of the law therein.

stated above, to apply to a partial restriction, a restriction limited to some particular place, otherwise the first Exception would have been unnecessary. In the next section the legislature, when it intends to speak of an absolute restraint, and not a partial one, has introduced the words "absolutely". This supports the view that the legislature in this section intends to prevent even a partial restraint.¹⁷ The section does away with the distinction observed in English cases between partial and total restraint of trade and makes all contracts falling within the terms of the section void unless they fall within the Exceptions.¹⁸ One reason that has been suggested is that trade in India is in its infancy and the legislature may have wished to make the smallest number of exceptions to the rule whereby trade may be restrained.¹⁹ It has been pointed out that so far as restraint of trade is an infringement of public policy its limits are defined by the section and apart from the section the aid of the rule of public policy cannot be invoked.²⁰

Considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract from those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and, therefore, do not fall under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not, therefore, a restraint of trade, unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one-sided, as in the case of *W. H. Milstead & Son Ltd.*, 1927 W. N. 233. In a recent case¹ the Supreme Court agreed with the Lower Courts that the negative covenant in that case, restricted as it was to the period of employment and to work similar or substantially similar to the one carried on by the appellant when he was in the employ of the respondent company, was reasonable and necessary for the protection of the company's interests and not such as the court would refuse to enforce. There was, therefore, no validity in the contention that the negative covenant contained in clause 17 of the agreement in that case amounted to a restraint of trade and therefore against public policy.

A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties, and (b) it is consistent with the interests of the public.²

17 *Madhub v. Rajcoomar*, 14 BLR 76.

18 See *Nur Ali v. Abdul*, 19 C 765; *Khem v. Dayal*, 1942 S. 114.

19 *Oakes & Co. v. Jackson*, 1 M 134, 145; *Har Bilas v. Mahadeo*, 1931 A 589; *Abdul v. Dubar*, 170 IC 479.

20 *Fraser & Co. v. Bombay Ice Mfg. Co.*, 29 B 107, 120, the contrary view expressed in *Haribhai v. Sharafali*, 22 B 861, see ss. 23, 24, not adopted.

1 *Niranjan v. Century Spinning & Mfg. Co.*, AIR 1967 SC 1098, 1104, 1105, where the relevant English and Indian case-law has been fully discussed.

2 *Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd.*, (1958) 2 WLR 858 CA; (1958) 2 All ER 65.

2. **Agreements in restraint of service.**—An agreement restraining an employee from taking service or engaging in any similar business for a period of five years from the date of the termination of his agreement, although the restriction only extended to a distance of 40 miles from the city, the place of his work, has been held void, as such a contract does not come under any of the Exceptions.³ An agreement that no member of a society should employ an employee who has left the service of another member, without his consent in writing, till after the expiration of two years from his leaving such service, has been held to be void.⁴ An agreement to exercise a trade or business for a given period in the exclusive service of one person is not an agreement in restraint of trade.⁵ An agreement which in effect absolutely restrained the plaintiff from carrying on the business of a *dubash* and also created a partial restraint upon his power to carry on the business of stevedore was held to be void.⁶

In *Herbert Morris Ltd. v. Saxelby*,⁷ it has been observed that there has been no case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the court. Where such covenants have been upheld it has been only on the ground that his acquaintance with his employer's trade secrets would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained. The Court will view restraints of trade, which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations, with more favour than they will regard contracts between masters and servants who do not stand in an equal position of bargaining.⁸ In the case of restraints upon the opportunity of a workman to earn his livelihood a different set of considerations has been recognised by the English Courts, namely, the employer must show that the restrictions go no further than is reasonable for the protection of his business and are not directed against his former servant's competition *per se*, although the purchaser of a goodwill is entitled to protect himself against such competition on the part of his vendor.⁹ But an agreement not to enter into any other employment or business of a similar nature,¹⁰ or to trade on his own

3 *Brahmaputra Tea Co. v. Scarth*, 11 C 545; *Oakes & Co. v. Jackson*, 1 M 135, 145.

4 *Mineral Water Bottle & Co. v. Booth*, 36 Ch D 465.

5 *Pragji v. Pranjivan*, 5 Bom LR 878, 881, see cases cited; *Subba v. Badsha*, 26 M 168; *Deshpande v. Arvind Mills*, 1946 B 423.

6 *Nur Ali v. Abdul*, 19 C 765.

7 (1916) 1 AC 688, 709; *Leng & Co. v. Andrews*, (1909) 1 Ch 763, *Mason v. Provident &c. Supply Co.*, 1913 AC 724; (1911-13) All ER Rep 400 *referred to*.

8 *English Hop Growers v. Dering*, (1928) 2 KB 174, 180; (1928) All ER Rep 396.

9 *Herbert Morris Ltd. v. Saxelby*, (1916) 1 AC 688; (1916-17) All ER Rep 305; *Attwood v. Lamont*, (1920) 3 KKB 571; (1920) All ER Rep 55, *fold in Wyatt v. Kreglinger*, (1939) 1 KB 798; (1933) All ER Rep 349; *Putsman v. Taylor*, (1927) 1 KB 637, 648, *on appeal* 741; *Bowler v. Lovegrove*, (1921) 1 Ch 642; see the rules laid down in *Hepworth Mfg. Co. v. Ryott*, (1920) 1 Ch 1; (1918-19) All ER Rep 1019 *restraints on contract of personal service*.

10 *Re A-Bell Alarm Co. v. Eisler*, (1926) 1 Ch 609.

account,¹¹ during the period of service, is valid. The Indian law seems to be much simpler. Where an actor was brought out from England under a contract containing a stipulation that he would not play at another theatre in India during his tour, the stipulation was held to be void as being in restraint of trade.¹²

3. **Agreements in restraint of trade competition.**—Liberty of trade is not an asset which the law will permit a person to barter away except in special circumstances.¹³ Whether a combination between traders or businessmen is or is not in reality "in restraint of trade", the answer must depend upon the facts of each particular case. Agreements of this description whereby traders agree among themselves to sell their wares at a fixed price, or labourers agree to labour at a stipulated wage, or whereby manufacturers agree with one another to carry on their works under special conditions, have in the English courts usually been treated as agreements in restraint of trade. They have in some instances been upheld¹⁴ and in some instances been ruled void,¹⁵ according as the restraints in such agreements were or were not deemed to be only sufficient to protect the interest of the parties entering into them. As has been said, in one sense every agreement for the sale of goods whether *in esse* or *in posse* is a contract in restraint of trade, but a reasonable construction must be put upon the section and not one which would render void the most common form of mercantile contracts.¹⁶ An agreement between two neighbouring landholders to the effect that a market for the sale of cattle shall not be held on the same day on the lands of both is not an agreement coming under this section.¹⁷ An agreement fixing the rate to be charged for ginning and baling cotton and the mode of division of profit amongst parties is neither in restraint of trade nor opposed to public policy.¹⁸ A contract for the purchase of goods at a certain rate for the Cuttack market, with a stipulation that if the goods are sent to Madras a higher price will have to be paid, is not one in restraint of trade.¹⁹ An agreement for sale of land accompanied by a separate contract by which the buyer stipulates to buy petrol of the vendor of land alone is not in restraint of trade.²⁰ An agreement among cotton spinners to close down their works at the will of the majority of the parties to the agreement has been held to be void.¹ But an agreement between two rival mill proprietors that one of the mills was not to be worked so long as the demand did not exceed 250 maunds

11 *Charlesworth v. MacDonald*, 23 B 103, 112.

12 *Cohen v. Wilkie*, 16 CWN 534.

13 *Vancouver B. Co. v. V. Breweries*, 1934 PC 101.

14 *Collins v. Locke*, 4 AC 674.

15 *Hilton v. Eckersley*, 6 E & B 47: 25 LJ QB 199.

16 *Mackenzie v. Striramiah*, 13 M 472; *Haribhai v. Sharafali*, 22 B 861; *Vancouver B. Co. v. V. Breweries*, 1934 PC 101.

17 *Pothi Ram v. Islam*, 37 A 212.

18 *Kuber v. Mahali*, 34 A 587.

19 *Prem Sook v. Dhurum*, 17 C 320.

20 *Foley v. Classique Coaches*, (1934) 2 KB 1: (1934) All ER Rep 88.

1 *Hilton v. Eckersley*, 6 E & B 47: 25 LJ QB 199.

a day has been held not to constitute a restraint of trade,² nor an agreement between two neighbouring millers not to charge less than a certain price for milling other people's rice.³ An agreement that the defendant should not manufacture any salt in excess of the quantity which the plaintiff might require to be manufactured is not bad as being in restraint of trade.⁴ An agreement between a seller and a purchaser that the subject of the bargain is not to be sold below a specified price and that the purchaser is to obtain similar agreements from his vendees is binding not being in restraint of trade.⁵ In partnership engagements a covenant that the partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged is binding.⁶ There is nothing illegal in the owners of commodities agreeing that they will sell to one of them only at a certain price, leaving that one to deal with the public and to make such profit as he can.⁷

4. **Recovery of consideration.**—Agreements in restraint of trade not being criminal and "having been executed, and the plaintiff having submitted to the restraint, he is⁸ clearly entitled to recover the consideration in respect of it". There is a difference between an action to enforce an illegal restraint and an action brought to recover the consideration for the restraint.⁹

5. **The Exceptions.**—The cases dealt with in the Exceptions to the section have been held not to be in restraint of trade under English decisions, but by making them exceptions the legislature shows that it considers them to be agreements in restraint of trade yet agreements which it is desirable to allow. An agreement not to supply labourers to a third person unless a certain sum of money is paid is void.¹⁰ The Exceptions do not enlarge the terms of the section. They apply to the case in which under certain specified circumstances a person agrees to be restrained from exercising a lawful profession, trade or business.¹¹

6. **Exception 1.**—*Prima facie* it is the privilege of a trader in a free country in all matters, not contrary to law, to regulate his own mode of carrying on his business according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed but no power of the general law ought to restrain his free discretion.¹²

2 *Daulatram v. Dharm*, 146 IC 1030.

3 *Tan Khwan v. Kegaw*, 18 IC 183, *refing to Collins v. Locke*, 4 AC 674.

4 *Sadagopa v. Mackenzie*, 15 M 79.

5 *Elliman v. Carrington*, (1901)2 Ch 275.

6 *Morris v. Colman*, 18 Ves 437: (1803-13) All ER 164.

7 *Jones v. North*, LR 19 Eq 426.

8 *Bishop v. Kitchin*, 38 LJ QB 20; *Wallis v. Day*, 2 M & W 273: (1835-42) All ER 426; but see *Madhub v. Rajcoomar*, 14 BLR 76.

9 *Haribhai v. Sharfali*, 22 B 861, see how judicial opinion varies as to a condition being in restraint of trade; see also *Mogul Steam Ship Co. v. Mc. Gregor*, 21 QBD 544: (1891-94) All ER Rep 263 on app. 1892 AC 25.

10 *Thangavelu v. Mukunda*, 21 IC 768.

11 *Madhub v. Rajcoomar*, 14 BLR 76.

12 *Hilton v. Eckersley*, 6 E & B 47, 74: 25 LJ QB 199 see *Leather Cloth Co. v. Lonsont*, LR 9 Eq 345.

Where the plaintiff sold his goodwill and business and bound himself not to engage in the business for a period of three years, the transaction amounted to a sale of a goodwill and so was covered by this Exception.¹³ When on sale of a business the vendor seeking to realise this piece of property obtains a purchaser upon a condition without which the transaction would be valueless, the law upholds his bargain not to compete and declines to permit a vendor to derogate from his own grant.¹⁴ It may therefore be treated as settled law that whenever the goodwill of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business, but he is under an obligation to refrain from canvassing customers of the old business prior to the sale.¹⁵ Solicitation of customers has not been allowed where one partner bought out the other and there was an express proviso that the sale of the goodwill was not to prevent either partner from starting a similar business in the neighbourhood.¹⁶

7. **Goodwill.**—Goodwill is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. Goodwill is property which may be acquired in any of the different ways in which property is usually acquired. The one attribute common to all cases of goodwill is the attribute of locality, for goodwill has no independent existence. It must be attached to a business.¹⁷

8. **To that extent.**—These words have been interpreted to mean that if an agreement can be broken up into parts it will be valid in respect of those parts which are not vitiated as being in restraint of trade. If it is not possible to resolve the agreement into its component parts the whole agreement must be regarded as void.¹⁸ But the court will not split up a single restriction expressed in indivisible terms.¹⁹ The court will decline to enforce a contract which is *ex facie* illegal, even if the illegality has not been pleaded, but if the illegality depends upon the surrounding circumstances, the question must be raised by the pleadings.²⁰

13 *Chandra Kanto v. Parasullah*, 48 C 1030 PC reversing 21 CWN 979.

14 *Herbert Morris Ltd. v. Saxelby*, (1910)1 AC 688.

15 *Trego v. Hunt*, 1896 AC 7: (1895-99) All ER Rep 804 fold in *Curl Bros. v. Webster*, (1904)1 Ch 685, in *Boorne v. Wicker*, (1927)1 Ch 667; the rule does not apply to a man whose property has been sold compulsorily by the operation of law, e.g., under bankruptcy law, see *Farey v. Cooper*, (1927)2 KB 384: (1927) All ER Rep 311.

16 *Gillingham v. Beddow*, (1900)2 Ch 242. See Partnership Act, 1. 36.

17 *Inland Revenue Commissioners v. Muller*, 1901 AC 217, 233; see *Trego v. Hunt*, 1896 AC 7: (1895-99) All ER Rep 801, cited in *Parasullah v. Chandra Kanta*, 21 CWN 979, 985.

18 *Parasullah v. Chandra Kanta*, 21 CWN 979; *Haynes v. Doman*, (1899)2 Ch 13, 24.

19 *Attwood v. Lamont*, (1920)3 KB 571: (1920) All ER Rep 55 cited in *British Concrete Co. v. Schelff*, (1921)2 Ch 563, 572.

20 *North W. Salt Co. v. Electrolytic Alkali Co.*, 1914 AC 461: (1914-15) All ER Rep 752.

An agreement in restraint of trade, though made abroad and valid according to the law of the place where made, will be void if it be intended to be performed in this country and infringe the provisions of this section.¹

28. Agreements in restraint of legal proceedings void.—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Savings of contract to refer to arbitration dispute that may arise.—Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred by such contracts.—When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.*

Saving of contract to refer questions that have already arisen.—Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

1. **The section.**—The provisions of this section embody a general rule recognised in English Courts which prohibits all agreements purporting to oust the jurisdiction of the Courts.² The section does not apply to contracts which merely contain provisions for referring disputes to arbitration but to those

1 *Oakes v. Jackson*, 1 M 143-5.

* The second clause of *Exception 1* to Section 28 is repealed by the Specific Relief Act, 1877 (I of 1877), throughout British India. The clause is, however, printed here because the Contract Act is in force in certain Scheduled Districts to which the Specific Relief Act does not apply. This clause was opposed to English authorities which have decided that the courts should not grant specific performance of agreements to refer. This portion has, probably for that reason, been repealed, and has been inserted, with certain changes, in S. 21 of the Specific Relief Act, *Adhibhai v. Cureandas*, 11 B 119, 213.

² *Asant v. Ashburner & Co.*, 1 A 267 FB; *Aghore v. Calcutta Tramways Co.*, 11 C 232; *Ardesar v. Bikhilai*, 150 IC 793.

which wholly or partially prohibit the parties from having recourse to a Court of law.³

2. **Agreements affecting the limitation of suits.**—The section contemplates the suspension permanently or temporarily of the usual remedies for the enforcement of legal rights. Where parties agree to refer certain matters to arbitration and one of the parties stipulates that he will not plead limitation, the stipulation is void.⁴ A party cannot also contract himself out of his right to resort to a Court or agree to alter the period prescribed for a suit in the Limitation Act.⁵ A provision limiting the right of the donee to sue for one year's arrears only is bad as offending this section.⁶ Insurance policies commonly contain the condition that "if the claim be made and rejected and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be forfeited". Such a condition has been held not to be void.⁷ But a distinction has been drawn between the extinction of a right and the loss of a remedy. Sec. 28 of the Limitation Act shows the cases in which the loss of the remedy will destroy the right. On the other hand, the loss of a right involves the disappearance of a remedy. The section aims at the prohibition of agreements which would only operate so long as rights are in existence. Conditions which clearly and distinctly limit the period within which the suit may be brought are distinctly conditions that are void under this section. But there is undoubtedly a marked distinction between a condition which so limits the time within which a suit may be brought to enforce rights and one which provides that there shall no longer be any rights to enforce. Such a condition is not illegal in itself. A man may contract that on the happening of a certain event he shall lose all his rights, such a condition is not an infringement of any of the provisions of the Limitation Act.⁸ A clause in an insurance policy limiting the right to enforce the arbitration agreement to twelve months from the happening of the loss or damage is not hit by sec. 28.⁹ An agreement to the effect that "no suit shall be brought against the company in connection with the said policy later than one year after the time when the cause of action accrues" is one by which a party restricts himself from enforcing his rights after the expiry of the stipulated period though within the period

3 *Koegler v. Coringa Oil Co.*, 1 C 42, 466; *Mulji Tejsingh v. Ransi Devraj*, 34 B 13; *Central Govt. v. Chotalal*, 1949 B 359.

4 *Ramamurthy v. Gopayya*, 40 M 701; See S. 23.

5 *Hirabhai v. Manufacturers' Life Insurance Co.*, 14 Bom LR 741; see S. 23; *Saroj v. Jnanada*, 36 CWN 555; *Jawahar v. Mathura*, 1934 A 661 FB.

6 *Saroj v. Jnanada*, 36 CWN 555.

7 *Home Insurance Co. v. Victoria M. F. Insce. Co.*, 1907 AC 59; *Atlantic Shipping Co. v. Dreyfus*, 1922 AC 250: (1922) All ER Rep 559 cited in *Girdharilal v. Eagle Star Co.*, 27 CWN 955; *Baroda S. & W. Co. v. Satyanarayan M. & F. Co.*, 38 B 344; *Ghose v. Reliance Insce. Co.*, 11 R 475; *R. G. Insce Co. v. B. Bank*, 1950 EP 352; *New India Assurance Co. v. R. M. Khandelwal*, AIR 1974 Bom 228, 238.

8 *Rainy v. Burma F. & M. Insurance Co.*, 3 Rang 383; *Giridharilal v. E. S. & B. D. Insurance*, 27 CWN 955; *Saroj v. Jnanada*, 36 CWN 555.

9 *M. Singh v. Vulcan Insurance Co.*, AIR 1972 Delhi 182, 185-86.

of limitation, so it has been construed as a mere waiver of rights and held not to infringe the provisions of this section.¹⁰ But the correctness of this decision has been doubted¹¹ and in *Ma Ywel v. China Life Insurance Co.*¹² it has been held that a condition in a life policy that no suit shall be brought on the policy after one year from the death of the assured is void. A clause in an indent providing that no claim or dispute of any sort whatever can be recognised if not made in writing within 60 days from the date of payment is void. It does not take away the statutory right of the plaintiff to bring his claim within the period prescribed by law.¹³ Similarly parties, it seems, cannot contract themselves out of the Evidence Act.¹⁴

3. Contracting out of the jurisdiction of Courts.—An agreement that only one out of two competent courts shall try the dispute is not contrary to public policy and does not contravene sec. 28.¹⁵ Such an agreement is to be strictly construed.¹⁶ But where parties agreed between themselves that for the purposes of litigation the contract should be deemed to have been entered into in Karachi, the contract having been actually made elsewhere, the contract was void and the Karachi Court had no jurisdiction,¹⁷ for the parties can by mutual consent no more take away the jurisdiction vested by law in any court than they can confer on it when it is not so vested by law.¹⁸ Although it may be contrary to public policy to oust the jurisdiction of the English courts, it cannot be the public policy of England to oust a plaintiff in the English courts from suing on an agreement, assuming that it is otherwise actionable, on the ground that that agreement purports to oust the jurisdiction of the foreign court.¹⁹

4. Agreements in restraint of legal proceedings.—The rule laid down in the section does not make an agreement for the purpose of compromising a claim, *bona fide* made, to which a party believes himself to be liable, and with the nature and extent of which he is fully acquainted, void. Thus in consideration of A giving B time to satisfy a decree against him held by A, B agreed not to appeal against the decree, the agreement was valid.²⁰ An agreement between the parties that the question in dispute in one suit should be decided according to the judgment in another suit is void, the agreement not being a compromise. But an agreement to refer to arbitration or to make the oath of

10 *Hirabhai v. Manufacturers' Life Assurance Co.*, 14 Bom LR 741; *Dawood v. Q. Insurance*, 1949 C 390; *Haji Shakoor v. Hind & Co.*, 1982 B 330.

11 *Baroda Spinning and Weaving Co. v. Satyanarayan*, 38 B 344.

12 11 IC 756.

13 *Nathumal v. Ramsarup*, 135 IC 779.

14 *Narayan v. Motilal*, 1 B 45.

15 *Hakam Singh v. Gammar Ltd.*, AIR 1971 SC 740; *Nanak Chand v. T. T. Elec. Supply Co.*, AIR 1975 Mad 103; *Union of India v. Bulgari*, AIR 1973 Cal 526, 528.

16 *Vastiram v. Rama*, 1947 M 99.

17 *Dreyfus & Co. v. Miran*, 1 IC 965.

18 *National Petroleum Co. v. Rebello*, 157 IC 315 *re* *Kidri v. Khosla*, 75 IC 590; *Jagannath v. Burma Oil Co.*, 119 IC 481; probably overruled by *National Petroleum Co. v. Meghraj*, 1937 N 334.

Addison v. Brown, (1954)1 WLR 779, 784; (1954)2 All ER 213.

Anant v. Ashburner & Co., 1 A 267 FB; *Bhrigunath v. Annapurna*, 153 IC 1098.

one of the parties conclusive evidence of all or any facts in issue between them is binding.¹ An agreement by which the parties agree to abide by the decision of an appeal and in accordance with it pay and receive damages is valid.² An agreement not to appeal is void.³ A compromise of a suit by which a party stipulates not to prefer an appeal from the decree is binding and the party cannot be allowed to prosecute the appeal.⁴ An agreement between parties to leave a case for the decision of the court without procuring any evidence, oral or documentary, is binding.⁵ The difference between a consent decree declaring the agreement of parties and an agreement of parties themselves is that in the former case it would not be open to question the accuracy of the decree.⁶ An agreement to take an oath on a certain day and that on failing to do so the suit should be dismissed is not binding, as the agreement is not an adjustment of a suit.⁷ An agreement between the transferor and the transferee of a decree that the latter shall not in any way enforce his rights under the decree, *e.g.*, by execution, is void, as it has the effect of restricting him absolutely from enforcing his rights in execution as a transferee of the decree. The agreement is no bar therefore to an application for execution.⁸ A deed of monthly allowance imposing a restriction for the recovery of arrears of over one year is void.⁹ The prohibition mentioned in the section does not include rights under a decree.¹⁰ Where counsel with the consent of his client stated that if the High Court would restrict its judgment to a finding on one of several issues his client would not appeal to England, the contract was binding.¹¹ A collateral agreement not to sue for a limited time does not suspend a right of action.¹²

5. **Exception 1.**—Parties may contract that no right of action shall accrue until an arbitrator has decided not merely as to the amount of damages to be recovered but upon any dispute that may arise upon the policy. This is a partial exclusion of jurisdiction of the courts. The language of this Exception means that an agreement by which a party is not absolutely restricted from enforcing all his rights under or in respect of the contract by the usual legal proceedings, but is only restricted from enforcing any such rights as are not given him by the arbitrator in the shape of money compensation, is not for-

1 *Venkatagiri v. Chinta*, 37 M 408.

2 *Rameshwar v. N. J. Sugar & Co.*, 94 IC 371.

3 *Bhrigu v. Annapurna*, 1934 P. 644.

4 *Shiwaji v. Atiram*, 134 IC 262, *Protap v. Arathon*, 8 C 455 *refd. to*; but see *Matta v. Matta*, 1941 P. 349.

5 *Bashir v. Sadiq*, 120 IC 826.

6 *Madhav v. Jan.* 1942 S. 37.

7 *Etakkott v. Etakkott*, 31 M 1.

8 *Muthiah v. Govindoss*, 44 M 919; but see *Meenakshi v. Swaminath*, (1938) 2 MLJ 404.

9 *Saroj v. Jnanada*, 1932 C 720.

10 *Ramghulam v. Janki*, 7 A 124, 131.

11 *Amir Ali v. Inderjit*, 9 BLR 460 PC a case before the Contract Act, *fold in Anant v. Ashburner & Co.*, 1 A 267 FB.

12 *Somasundaram v. Narasimha*, 29 M 212.

bidden or made illegal by the section.¹³ An agreement to refer any dispute arising out of a contract to the arbitration of a body of persons is covered by this Exception.¹⁴ Such a clause is in no way in restraint of legal proceedings but if properly framed is to render proceedings unnecessary.¹⁵ An arbitration clause in a contract can be regarded as a thing apart from the main conditions of the contract.¹⁶ No cause of action arises until the arbitrators have determined.¹⁷ A provision in a contract which enables either party to make a submission to arbitration a rule of the High Court (in England) cannot be interpreted to restrict absolutely the right of the plaintiff to enforce the contract by the usual legal proceedings in the ordinary tribunal.¹⁸ In a contract with the Secretary of State a stipulation that the parties shall abide by the decision of the Deputy Commissioner may be regarded as an agreement for reference to arbitration and comes under this Exception and a suit is barred by S. 21 of the Special Relief Act.¹⁹ Building contracts very often provide that certificates of architects or engineers will be conclusive as regards defects of construction or sums due and payable to contractors; such certificates are conclusive,²⁰ and payments cannot be demanded even if the certificate be withheld by fraud.¹ The final certificate is conclusive and can be challenged only on the ground of fraud, collusion, misconduct.² An agreement by parties that they shall not object to any award the arbitrators might make, "with or without any enquiry on the issues or beyond the issues, or in any way they please", is void under this section and the award may be set aside. The discretion of the court to set aside an award on any valid ground cannot be controlled by any agreement between the parties.³ When submission to an arbitration is unauthorised, the award based upon such a reference cannot be enforced as a decree against a party who has not ratified the unauthorised arbitration.⁴ Where the manager of a company was constituted by an agreement between the company and an employee the sole arbitrator between them as to whether in the event of the latter's misconduct the company was entitled to retain the sole or a part of the deposit and of any

13 *Koegler v. Coringa Oil Co.*, 1 C 42 foling *Scott v. Avery*, 5 HLC 811: (1843-60) All ER Rep 1: see *Cooverji v. Bhimji*, 6 B 528; *Dawson v. Fitzgerald*, 1 Ex D 257; see *Darbey v. Whittaker*, 4 Dr 134, 140.

14 *Ganges Manufacturing Co. v. Indra Chand*, 33 C 1169; *Tilakram v. Kodumal*, 30 Bom LR 546; *Ganga v. Ram*, 1932 L 459.

15 *Chapsey v. Gill*, 7 Bom LR 805; see *Adhibai v. Cursandas*, 11 B 199, 213.

16 *Karm v. Volkart*, 1946 L 116 FB.

17 *Caledonian Insee. Co. v. Gilmour*, 1893 AC 85, 90, 97. fold in *Board of Trade v. Cayzer*, 1927 AC 610.

18 *Jacks v. Harrowing S. S. Co.*, 139 IC 769; *Banwari v. H. College*, 1949 EP 165.

19 *Secretary of State v. Saran*, 139 IC 362; *Kashi v. Alamara*, 150 IC 1131; see *Wadsworth v. Smith*, LR 6 QB 332.

20 *Robins v. Goddard*, (1905)I KB 294; *Kuppusami v. Smith & Co.*, 19 M 178; *S. I. Ry. v. Bhashyam*, 161 IC 65.

1 *Milner v. Field*, 20 LJ, Ex 68.

2 *Motilal v. Ram*, 1942 B 334.

3 *Naraindas v. Kewalram*, 42 IC 706, fold in *Parsram v. Topandas*, 102 IC 183; *Abdul v. Bhawal*, 1950 L 174.

4 *Madangopal v. Sanwaldas*, 1948 S. 79.

wages that might be due to him at the time of his discharge, *held* that the certificate of the manager was to be under the arbitration clause conclusive evidence in courts of the amount which the company was entitled to retain.⁵ A clause providing for arbitration at Genoa in case of dispute between the parties and containing a clause ousting the jurisdiction of the courts is void in respect of the portion relating to the ouster of the jurisdiction; accordingly the suit was stayed pending the decision of the arbitrator at Genoa.⁶ Where a suit is brought on a contract containing a reference to arbitration, the suit is stayed.⁷ A stipulation that the award of an arbitrator shall be accepted as final restricts the rights of the contracting parties to invoke the aid of the ordinary courts to examine and, if necessary, to set aside or alter the award and is, therefore, void.⁸ It is well settled that if a party to a contract agrees that in case of any dispute arising out of the contract, or in any matter concerning the contract, he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him, being a decision by a person in his own cause.⁹ Under an ordinary submission clause contained in a commercial contract no valid reference to arbitration can be made where the claim is time-barred, although different considerations arise in respect of an agreement between the parties which falls within this Exception.¹⁰ The court has no jurisdiction to allow a dispute relating to the genuineness of a will in a probate proceeding pending before it to be referred to arbitration. Such a course, if permitted, would open the door to fraud and collusion.¹¹ If the agreement be that the price shall be that which is to be ascertained upon a fair valuation, the court may determine the value. But where parties have stipulated that the price shall be ascertained by arbitration, if the arbitration does not proceed, the court has no right to ascertain the price in some different mode.¹² Although it is within the discretion of the court, when one of two parties desires, it to refer a dispute to arbitration, yet the court will refuse the reference when it is desired by the party charged with fraud.¹³

6. **Exception 1: Second Clause.**—The contract, the existence of which would bar a suit under the circumstances contemplated by Exception I, must be an operative contract and not a contract broken up by the conduct of the parties to it.¹⁴ The mere filing of a plaint does not amount to a refusal to

5 *Aghore v. Calcutta Tramways Co.*, 11 C 232; *S. of S. v. Saran*, 1932 O 265.

6 *Marittima I. S. Co. v. Burjor*, 54 B 278.

7 *Brindaban v. Bisheswar*, (1937)1 Cal 606.

8 *Ranga v. Sithaya*, 6 M 368; *Naraindas v. Kewalram*, 42 IC 706.

9 *Burmah Oil Co. v. Naraindas*, 104 IC 185; see *Eckersley v. Mersey Docks*, (1894)2 QB 667; (1891-94) All ER Rep 1130; *India Electric Co. v. G. E. T. Co.*, 53 B 573; *Moffatt v. Dickson*, 22 LJ CP 265; *Standard v. Lee*, 32 LJ QB 75; 122 ER 138; *Anukul v. Gurupada*, 1936 C 643.

10 *Uttamchand v. Balmokand*, 107 IC 435.

11 *Gopi v. Baijnath*, 53 A 97.

12 *Morgan v. Millman*, 22 LJ Ch 897.

13 *Laldas v. Italia*, (1938)2 MLJ 531.

14 *Tahal v. Bisheswar*, 8 A 57; *Sheoambar v. Deodat*, 9 A 168.

refer to arbitration.¹⁵ If in spite of a submission for a reference to arbitration a party chooses to bring his suit, the other party can then decide whether or not he will remain before the court or whether he will have the dispute referred to arbitration.¹⁶ The law does not permit the same question to be decided by a court of law as well as by an arbitrator; when the dispute between the two tribunals is identical a decision given by the arbitrator must be treated as *ultra vires*.¹⁷ A mere agreement to refer any dispute that may arise to arbitration does not of itself oust the jurisdiction of the court, but the case is different where under a contract, *e.g.*, a policy of fire insurance, the condition to ascertain the damage by arbitration is incorporated with and forms an integral part of the contract of indemnity and is a condition precedent to the bringing of an action upon the policy¹⁸ because in such a case no liability arises until the award has been made.¹⁹ Consequently in such cases the insured has no right of action unless and until an award in the arbitration has been made and the amount due has been ascertained.²⁰ A condition in a contract to refer to arbitration any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract, but where a contract between the parties simply contains a clause to refer to arbitration, then an action may be brought in spite of that clause although there has been no arbitration, as such a contract does not oust the court of its jurisdiction.¹ Where an arbitration for any reason becomes abortive it is the duty of a court to come to the assistance of the parties by the removal of the impasse and the extrication of their rights.² An award made during the pendency of an action is invalid because a court of law is seized of the dispute and cannot allow an arbitrator to oust its jurisdiction; the decision of the arbitrator is *ultra vires* in such a case. But the matter is different when the dispute before the arbitrator is different from that before the court.³

29. Agreements void for uncertainty.—Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations

(a) A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

15 *Koomud v. Chunder Kant*, 5 C 498; *Tahal v. Bisheshar*, 8 A 57.

16 *A. P. Oil Co. v. Panchapakesa*, 45 MLJ 653; see S. 19, Arbitration Act; *Sheo Dat v. Sheo Shankar*, 27 A 53.

17 *Tekchand v. Harjas*, (1929) Lah 564.

18 *Caledonian Insurance v. Gilmour*, 1893 AC 85.

19 *Viney v. Bignold*, 20 QBD 172.

20 *Woodall v. Pearl Insurance Co.*, (1919) 1 KB 593; (1918-19) All ER Rep 544.

1 *Roper v. Lendon*, 28 LJ QB 260; see *Edwards v. Aberayron Insce Society*, 1 QBD 563; *Cipriani v. Burnett*, 31 ALJ 411 PC; *Gairda v. Rameshwar*, 1937 ALJ 823.

2 *Cameron v. Cuddy*, 1914 AC 651, 656.

3 *Jai Narain v. Narain*, 69 IC 585.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in cocoanut oil only, agrees to sell to *B* "one hundred tons of oil." The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of cocoanut oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar." There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

1. **The section.**—Vagueness is a misleading term. A contract may be so vague that it cannot be understood, in that case it is of no effect. There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come into existence and is capable of being identified, the contract cannot be so vague as to be incapable of being enforced. Accordingly a mortgage of property to which a person may become entitled during its pendency, or of property which is to come into existence in future, is valid.⁴ Where by an arbitration clause any dispute arising out of the contract is to be referred to a Chamber of Commerce in Calcutta where there are many Chambers of Commerce the clause is void for uncertainty as it is not certain which Chamber of Commerce is the named arbitrator.⁵ Courts would be loth to hold a contract void for uncertainty if it was not pleaded as a bar to the legality of the agreement, and if the parties themselves acted upon the terms and therefore did not regard them to be vague or indefinite.⁶ A party to a contract who uses words which are not altogether meaningless, but susceptible of two different meanings, is bound by the interpretation reasonably put upon the terms with an honest desire to perform his part of the contract by any other party to the contract.⁷ The court prefers a construction of an ambiguous contract which will make it valid and not void.⁸ Where however a contract is susceptible of two interpretations which are totally inconsistent with each other it is void for uncertainty.⁹ "Where the mistake in the expression of a written contract is obvious upon the face of the instrument, so as to leave no doubt of the intention of the parties without extrinsic evidence to explain it, the mistake is corrected as a mere matter of construction, and the contract is construed in accordance with the obvious intention, both at

4 *Baldeo v. Miller*, 31 C 667; *Sree Sankarachari v. Varada*, 27 M 332; *New Beerbhoom Coal Co. v. Bularam*, 5 C 932 PC.

5 *Karanji & Co. v. Indo-China Trading Co. Ltd.*, (1952) 56 CWN 763.

6 *Indraraj v. Chaitram*, 117 IC 271.

7 *Ireland v. Livingston*, LR 5 HL 395, 416: (1916-17) All ER Rep 585; *fold in Weigall v. Runciman*, 85 LJKB 1187.

8 *Mills v. Dunham*, (1891) 1 Ch 576, 590.

9 *Gopal v. Gana*, 63 IC 48.

law and in equity".¹⁰ When an instrument appears on its face to be free from ambiguity but it transpires that the words are equally applicable to two or more persons or things, there is what is called a latent ambiguity or equivocation.¹¹ Such ambiguity is not discovered till the instrument comes to be applied to external circumstances. In such cases "extrinsic evidence has created the ambiguity and extrinsic evidence is admissible to remove it". Such evidence may be evidence of intention or of user.¹² Exceptions to general promises must be clearly laid down. "An ambiguous document is no protection".¹³ With regard to the meaning of the word 'certainty', it will be well to bear in mind the dictum:¹⁴ "The court must govern itself by a moral certainty, for it is impossible in the nature of things that there should be a mathematical certainty of a good title". Where a deed of sale provides that price is payable in instalments and that on payment of each instalment a proportionate part of the land is to be released to the purchaser, but there is no machinery for determining which part of the land is to be conveyed at each stage, it cannot be said that the terms are not sufficiently certain to constitute a binding contract.¹⁵

Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of Courts is to give a meaning, if possible. This was laid down by the House of Lords in *Hillas & Co. v. Arcos Ltd.*,¹⁶ and the observations of Lord Wright have become classic, and have been quoted with approval both by the Judicial Committee and the House of Lords ever since. The latest case of the House of Lords is *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.*¹⁷ There the clause was "This bill of lading", whereas the document to which it referred was a charter-party. Viscount Simonds summarised at p. 158 all the rules applicable to construction of commercial documents, and laid down that effort should always be made to construe commercial agreements broadly and one must not be astute to find defects in them, or reject them as meaningless.¹⁸

2. Ambiguous contracts.—The section contemplates that the meaning of an agreement shall be clear on the face of it. An undertaking to pay a certain amount 'after deductions as would be agreed upon between the parties' must fail.¹⁹ A contract to negotiate for the settlement of the price to be paid for developing an area even though supported by consideration is too uncertain to have any binding force.²⁰ The doctrine of law which makes vague contracts incapable

10 *Kerr on Fraud*, 5th Ed. 523 cited in *Abdul v. Tahira*, 89 IC 51; *Rajaram v. Rameshwar*, 1936 O 270; *Wilson v. Wilson*, 5 HLC 40.

11 *Doe v. Hiscocks*, 4 M & W 368, 369: (1835-42) All ER Rep 380.

12 *Chairman, Serajgunj Municipality v. Chittagong etc.*, 36 CLJ 242; *Indra Raj v. Chait Ram*, 117 IC 271, 274; see *Lakshmi v. Venkata*, 39 M 509, 523 PC.

13 *Nelson Line v. Nelson & Sons*, 1908 AC 16: (1904-07) All ER Rep 244.

14 *Lyddall v. Weston*, 2 Atk 19.

15 *Bushwall Properties v. Vortex Properties*, (1975)2 All ER 214.

16 (1932) All ER Rep 494.

17 1959 AC 133.

18 *Dhanrajamal v. Shamji*, AIR 1961 SC 1285, 1291, 1292.

19 *Koovuru v. Kumar*, 1945 M 10.

20 *Courtney v. Tolaini*, [1975]1 All ER 716.

of enforcement and which finds expression in this section rests upon practical common sense. It is obviously impossible for a court to give effect to a contract the meaning of which it is unable to find out with reasonable clearness. The principle is firmly established that a court cannot undertake to supply defects or ambiguities according to its own notions of what is reasonable; for this would be not to enforce a contract made by the parties but to make a new contract for them.¹ The term of an agreement cannot be said to be uncertain when the material words are clear.² Where an ambiguity appears on the face of an instrument, i.e., there is a patent ambiguity, evidence of intention is not admissible to explain the instrument or remove the ambiguity. Where a bill of exchange was expressed in figures to be drawn for £245 and in words for two hundred pounds with a stamp for the higher amount, evidence to show that the words "and forty-five" had been omitted by mistake was not admissible.³ The word 'pounds' has been supplied in a contract to make its meaning complete.⁴ But extrinsic evidence is admissible to identify the person and things to which an instrument refers, i.e., to explain a latent ambiguity.⁵ Where certain persons describing themselves as residents of a certain locality gave a bond by which they charged their property, the agreement was void for uncertainty.⁶ But the meaning of the words "our zamindari property", which was the subject-matter of a mortgage, is not so uncertain or incapable of being made certain in the light of surrounding circumstances as to be regarded as a void contract.⁷ A contract for the exchange of property belonging to parties reserving a right of pre-emption in case of alienation is not void for uncertainty.⁸ A promise by a tenant to pay whatever rent the landlords may impose for any land not assessed is bad for uncertainty.⁹ A contract would not be vague and uncertain because one of the contracting parties promised to incur a large expenditure in excess of what it was then spending.¹⁰ An instrument in these terms "I, J. M. C., do hereby promise to pay at Allahabad to the manager of the Agra Savings Bank the sum of Rs. 10 on or before the 15th day of October 1876, and a similar sum monthly every succeeding month for full value and consideration received", has been held to be too vague to fall within the category of a promissory note.¹¹ Vague statements or inferences cannot be relied upon to extinguish a right accrued under a promissory note.¹² A promise to pay £5 more after the purchase of

1 *Barkat v. Anant*, 31 IC 632; *Davies v. Davies*, 36 Ch D 359; 56 LJ Ch 962 reld. to *Dwarkanadas & Co. v. Daluram*, 1951 C 10 FB: 54 CWN 544.

2 *Ram v. Chinubhari*, 1944 B 76.

3 *Saunderson v. Piper*, 5 Bing NC 425.

4 *Coles v. Hume*, 8 B&C 568.

5 *Bank of New Zealand v. Simpson*, 1900 AC 182; 69 LJ PC 22.

6 *Deojit v. Pitambar*, 1 A 275.

7 *Shadilal v. Thakur*, 12 A 175; see *Sree Sankarachari v. Varada*, 27 M 332; *New Beerbhoom Coal Co. v. Bularam*, 5 C 982, 7 IA 107.

8 *Aulad Ali v. Ali Athar*, 49 A 527 FB.

9 *Ramasami v. Rajagopala*, 11 M. 200.

10 *Municipal Corp., Bombay v. Secretary of State*, 58 B 660, 692.

11 *Carter v. Agra Savings Bank*, 5 A 562.

12 *Canara I. & B. Syndicate v. Narayan*, 1942 B 15.

a horse if it proved "lucky" is too vague to be enforced, for "who is to say under what circumstances a horse shall be said to have proved lucky?"¹³ The words 'for the time being' have been held to make an agreement vague.¹⁴ An agreement for letting and taking "coals &c" where the document contained no more definite description of the minerals, was held too vague to be enforced.¹⁵ Where on a sale of property the price cannot be ascertained in the manner stipulated by the parties, the Court cannot interfere to aid the carrying out of the contract,¹⁶ but it can interfere if the price can be ascertained in the manner stipulated or if the contract stipulates for a fair price.¹⁷ If it cannot be discovered from an agreement from what time the lease is to begin, the agreement cannot be enforced.¹⁸ An agreement to place one's daughter, if and when born, at the disposal of another, to be given away in marriage by the latter, is void.¹⁹ Gifts or contracts, expressed to be for maintenance and definite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity, but *prima facie* they are limited to the life either of the grantor or the grantee. A compromise may be too vague to be enforced.²⁰ A contract, void for uncertainty, cannot be rendered certain by part performance, but in respect of a contract complete in itself, evidence is admissible as to what terms are reasonable if the parties have contracted to act upon reasonable terms.¹ There are cases in which the court will go to a great extent in order to do justice between the parties when possession has been taken and there is an uncertainty about the terms of the contract.² The mere reference by the buyer to the proposed sale of his properties to indicate the source of funds for the payment of sale consideration without any suggestion that the payment of price depends on such sale or the absence of a term in the agreement as to what is to happen on the buyer's failure to purchase the property are not circumstances which render the contract void under sec. 29 for uncertainty.³ An agreement to pay enhanced rate of interest which may be fixed by the creditor is not void for uncertainty.⁴

3. Construction of contracts.—There is no section in the Act dealing with the construction of contracts. The following rules deduced from decided cases will perhaps be helpful. A contract must be construed according to its own terms and not be explained or interpreted by antecedent communings

13 *Guthing v. Lynn*, 3 B & Ad. 232: 109 ER 1130.

14 *Governor General v. S. B. & I. Co.*, 1947 L 215.

15 *Price v. Griffith*, 1 DGM & G 80; see *Gaj Kumar v. Lachman*, 14 CLJ 627, 632.

16 *Vickers v. Vickers*, LR 4 Eq 529; *Hart v. Hart*, 18 Ch D 670: 50 LJ Ch 697.

17 *Ram v. Kali*, 104 IC 527.

18 *Marshall v. Berridge*, 19 Ch D 233: (1881-85) All ER Rep 908.

19 *Atma v. Banku*, 125 IC 369.

20 *Karim v. Heinrichs*, 28 IA 198. *Jai Gobind v. Bagal*, 1950 Pat. 445.

1 *Waring & Gillow v. Thompson*, 29 TLR 154; *Oxford v. Provan*, LR 2 PC 135: 16 ER 472 PC.

2 *East India Co. v. Nuthum*, 7 Moo. PC 482, 497.

3 *Sohbat Dei v. Devi Phal*, AIR 1971 SC 2192.

4 *D. Lohiah Chetty v. MPHJS Nidhi*, AIR 1972 Mad 407.

which led up to it. This is specially true of a conveyance.⁵ The court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations.⁶ Subsequent conduct too need not be looked at.⁷ The language,⁸ or the construction by the court⁹ of one document does not afford much assistance to the construction of another. Reasonable interpretation is certainly *prima facie* to be adopted if the words admit. Words of ordinary user must be construed in their natural sense in view of the circumstances of the case¹⁰; before evidence of secondary meaning can be admitted the court must be satisfied that the words should be so construed.¹¹ The same sense is to be put upon the words of a contract.¹² There is no magic in words.¹³ Each part of a contract must be read so as to give effect to the whole, if possible.¹⁴ In determining a question between contracting parties recourse must be had to the language of the contract itself and force, fraud and mistake apart, the true construction of the language is the touchstone of legal rights.¹⁵ Surrounding circumstances are not to be ignored.¹⁶ In all contracts, where the meaning of the language is to be determined by the court, the governing principle must be to ascertain the intention of the parties through the words they have used. It is seldom in mercantile contracts that any technical or artificial rule of law can be brought to bear upon their construction.¹⁷ When words of a contract are clear the court cannot speculate whether the parties meant something different from what they actually said.¹⁸ It would be contrary to reason and every rule of construction to put an interpretation upon ambiguous words that shall defeat or qualify words which are clear and express.¹⁹ Where ambiguous terms or phrases are found in a mercantile contract, evidence of usage is admissible to explain the meaning of the expression in a particular trade or locality; where a contract is silent in respect of some incidental term or condition, which, according to the course of business established in a particular trade, it is customary to find included in such a contract evidence of custom is admissible to prove that such term or

5 *Bomanji v. Secretary of State*, 33 CWN 293, 297 PC; *Shore v. Wilson*, 9 Cl. & F. 355; *Lucknow I. Trust v. Jaitly*, 124 IC 423; *Inglis v. Buttery*, 3 AC 552; *Ford v. Beech*, 17 LJQB 111, 116; 11 QB 852; 116 ER 693; *Steel Bros. v. Tokersee*, 10 R 372 refd to in *Kyi v. Morrison*, 11 R 506; see *Coddington v. Paleologo*, LR 2 Ex 193, 200.

6 *Prenn v. Simmonds*, (1971)3 All ER 237 HL.

7 *Narasimham v. Venkata*, 1923 M 171.

8 *Subbarayar v. Subbammal*, 24 M 214, 218 PC.

9 *Aspden v. Seddon*, LR 10 Ch 394, 404.

10 *Western Power Co. v. Crop of Matsqui*, 152 IC 401 PC.

11 *Holt v. Collyer*, 16 Ch D 718.

12 *Seddon v. Senate*, 13 East 63, 74; 104 ER 290.

13 *Isaacson v. Harwood*, LR 3 Ch 225; 37 LJ Ch 209.

14 *Elderslie S. S. Co. v. Borthwick*, 1905 AC 93.

15 *Baidyanath v. Kamini*, 6 CLJ 572.

16 *Moolchand v. A. Agencies*, 1942 M 139.

17 *Mc. Connel v. Murphy*, LR 5 PC 203, 219; *Skinner v. Skinner*, 12 Lah 172.

18 *Secretary of State v. Gomti*, 1941 A 221.

19 *Proprietors E. & F. Credit Co. v. Arduin*, LR 5, HL 64, 79.

condition formed part of the contract, unless its incorporation will have the effect of introducing something repugnant to or inconsistent with the tenor of the written agreement. But a trade usage can neither determine nor affect the rights and obligations of the parties under a written contract the terms of which are capable of reasonable interpretation.²⁰ The contracts of the people of India ought to be liberally construed. "The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction disclose".¹ The construction of a contract is for the court unless there is something peculiar to the words by reason of the custom of the trade to which the contracts relate.²

In construing a contract it is, of course, the duty of the court to look into the heart of the matter to ascertain its true meaning and the actual intention of the parties.³ That reasonably possible construction of a contract is to be adopted which would reconcile apparent inconsistencies.⁴ Where a contract is clear, the court will construe it independently of the ideas of the parties, but if it be ambiguous, the construction put upon it by a party as evidenced by his conduct is material.⁵ The court is not at liberty to adopt a view inconsistent with the terms of a written contract but can refer to the subsequent conduct of the parties for the purpose of making clear what the document was intended to mean.⁶ Where the question is one purely of construction of a contract the subsequent conduct of the party is irrelevant unless the terms of the contract are ambiguous.⁷ The court should consider to what extent the contract was so ambiguous as to justify resort to evidence as to negotiations.⁸ Where the contract, as expressed in writing, would be futile and would not carry out the intention of the parties, the law will imply any term, obviously intended by the parties, which is necessary to make the contract effectual.⁹ Ordinarily the court does not exist for the purpose of making a new contract between the parties but merely to determine and enforce such a contract, if any, as the parties themselves have made. But under exceptional circumstances it exercises the very unusual jurisdiction of making a bargain which the parties had not specifically made.¹⁰ If there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumera-

20 *Holmes Wilson v. Bata Kristo*, 54 C 549.

1 *Narain v. Mohendra*, 15 CLJ 332.

2 *Steel Bros. v. Tokerssee*, 10 R 372; *Skinner v. Skinner*, 12 Lah. 172.

3 *Maung Ba v. Motor House Co.*, 120 IC 132.

4 *R. C. Assocn. v. T. I. & S. Co.*, 1940 PC 151.

5 *Marshall v. Berridge*, 19 Ch D 233: (1881-85) All ER Rep 908; *Reliance Inscoe. Co. v. Duder*, (1913) 1 KB 265, 273.

6 *Baragi v. Baja*, 10 IC 250.

7 *Rustomji v. Dhairyawan*, 34 CWN 681 PC; but see *Nirod v. Harihar*, 32 CLJ 19, 24.

8 *Durmanim v. Micaleff*, 1946 PC 50.

9 *Oriental S. S. Co. v. Tylor*, (1898) 2 QB 518, 527; *Western Power Co. v. Corp. of Mutsqui*, 152 IC 401 PC.

10 *Gujarat Ginning & Co. v. M. H. S. & W. Co.*, 31 Bom LR 1310.

tion of particulars, will have no effect.¹¹ Words deleted form no part but words expressly added do form part of a mercantile contract.¹² Where there is a standard form of words familiar to commercial men and contained in a printed form in general use, such as the "Gencon" charter, it seems unreal to suppose that when the contracting parties strike out a provision dealing with a specific matter, but retain other provisions, they intend to effect any alteration other than the exclusion of the provision struck out.¹³ In commercial cases where printed forms are used, attention has been paid to words struck out. But in other cases a covenant such as one relating to tenancy, like any other covenant, is to be construed according to the intent of the parties as expressed by their own words, and by regard to the whole of the instrument, and the surrounding circumstances of the case, it being also a rule that if the words be doubtful, that construction is to be taken which is most strong against the covenantor.¹⁴ The special provisions in writing override the general printed statements which are inconsistent with them,¹⁵ but the court is not to discard the print altogether. It must discover the real contract of the parties from the printed as well as the written parts.¹⁶ Writing in type prevails over the printed portion.¹⁷ The words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted equally to their case and that of all the other contracting parties upon similar occasions and subjects.¹⁸ An inserted condition making a contract "subject to grant of export licences" is inconsistent with and must prevail over the printed condition making the sellers liable for all the consequences of inability to obtain licences, so that if proper steps had been taken and licences had not been granted the sellers would have been excused.¹⁹ Whether a condition in a contract is a condition precedent or not can only be determined by construing the actual language used considered in connection with the facts of the case. The subsequent conduct of the parties is irrelevant. The question is determined by the intention of the parties when the contract is made.²⁰ Similarly, if certain letters constitute an agreement, no testimony *aliunde* is admissible and

11 *Early v. Rathbone*, 57 LJ Ch 652.

12 *Sassoon v. International Banking Corp.*, 1927 AC 711, 721; *Re Srikrishna*, 148 IC 977.

13 *Louis Dreyfus v. Parnaso*, (1959)2 WLR 405, 412; (1959)1 All ER 502.

14 *City & Westminster Properties v. Mudd*, (1958)3 WLR 312, 319, 321.

15 *Noorbhai v. Allabux*, 19 Bom. LR 845.

16 *Beier v. Chotalal*, 30 BI 18.

17 *Moolchand v. A. Agencies*, 1942 M 139; *Ratilal v. D. C. Co.*, 1943 B 229.

18 *The Brabant*, (1966)2 WLR 909, 917.

19 *Societe D. C. Ltd. v. A. Besse & Co. (London) Ltd.*, (1952)1 TLR 644. See *Brauer v. Clark*, (1952)2 TLR 349 CA; (1952) All ER 497; where the typewritten clause stated that the contract was "subject to a Brazilian export licence".

20 *Edridge v. Sethna*, 58 B 101 PC.

subsequent letters cannot be referred to aid in construing the contract contained in the material letters.¹ The rate of payment for work done is determined by the terms of the contract. Extrinsic evidence as to the rate of payment allowed for similar work to another contractor is not admissible.² An agreement to lease is admissible for collateral purpose of finding out the terms on which specific performance should be granted.³ The burden of proving that a particular case comes within the exception clause provided in the contract lies upon the person who sets it up.⁴ If a party relies upon an exception he must prove that the circumstances are not attributable to his negligence. Before a suit to enforce a contract can be brought it is necessary to ascertain its exact terms so as to determine whether the defendant has been guilty of breach thereof.⁵ There is in law no difference of construction between mercantile contracts and other instruments.⁶

4. **Incorporation of terms.**—Where a contract for the sale of goods between B and C provided that it would be subject to the terms of a contract between A and B, the goods having been bought by B from A, an arbitration clause in the former contract was not incorporated in the latter.⁷ A *force majeure* clause in an indent contract of the importing firm is not applicable to a contract of sale 'on the usual terms' between subsequent sellers and buyers of the goods.⁸ Notice by a shipper of a charter-party has not the effect of incorporating into the bill of lading any terms which are inconsistent with the contract.⁹ In *M. G. V. & Sons v. T. V. R. R. Pillai & Sons*¹⁰ it was held that the term "subject to Shimogu jurisdiction" did not form part of the contract. The transactions of sale were arranged through brokers, and the purchasers were not proved to be aware of the said term. Hence the High Court came to the above conclusion.

30. Agreements by way of wager void.—Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

1 *Currimbhoy v. Creet*, 57 C 170; *Lewis v. Nicholson*, 21 LJQB 311: 18 QB 503: 118 ER 190.

2 *Jaswant v. Secretary of State*, 18 Bom LR 355 PC.

3 *Satyendra v. Anil*, 14 CWN 65.

4 *Sandeman & Sons v. T. & S. S. Co.*, 1913 AC 680, 689.

5 *Durga v. Shiv*, 135 IC 607.

6 *Southwell v. Bowditch*, 1 CPD 374: 45 LJ CP 630.

7 *Ramial v. Haribaz*, 38 CWN 737; per contra *Haji Vali v. Shamdeo*, 34 CWN 447; see *Radhakisson v. Balmukund*, 57 B. 218 PC; *Pirojshaw v. Ismail*, 57 B 225; *Dwarkadas & Co. v. Daluram*, 1951 C 10 FB.

8 *Huseinbhoy v. Ramdas*, 125 IC 803.

9 *Turner v. Goolam*, 28 B 573, 594 PC; *Serraino v. Campbell*, (1891) 1 QB 283; see *Aktieselskab v. Harding*, (1928) 2 KB 371, 390, 393; *Manchester Trust v. Furness*, (1895) 2 Q 539.

10 AIR 1974 Mad 186.

Exception in favour of certain prizes for horse-racing.—This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294-A of the Indian Penal Code not affected.—Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294-A of the Indian Penal Code (XLV of 1860) apply.

1. **The law of wager.**—The English Gaming Act, 8 & 9 Vict. c. 109, 1845, did not apply to India, but the common law of England did; according to it an action might be maintained on a wager, although the parties had no previous interest in the question on which it was laid, if it be not against the interests or feelings of third persons and did not lead to indecent evidence and was not contrary to public policy.¹¹ This section and Act 21 of 1848¹² were based on the English statute. The words of this section are almost identical with the words of that statute, the only difference being that in that enactment the word 'deposited' has been used instead of the words "entrusted to". By the subsequent statute of 1892 contracts collateral to gaming contracts which were not wagering contracts were rendered null and void.¹³

2. **What is a Wager.**—A wager is a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening.¹⁴ It is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken.¹⁵ To constitute a wager the transaction between the parties must "wholly depend on the risk in contemplation," "and neither must look to anything but the payment of money on the determination of an uncertainty." But if one of the parties has "the event in his own hands," the transaction lacks an essential ingredient of a wager.¹⁶ As has been said, "the essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win".¹⁷ Where the plaintiff and the defendant made an agreement to enter into a wrestling contest, in which the winner was to be rewarded by receiving the whole of the

11 *Ramloll v. Soojummull*, 4 MIA 339.

12 An Act for Avoiding Wagers, repealed by this Act.

13 *Forget v. Ostigny*, 1895 AC 318, 326.

14 *Hampden v. Walsh*, 1 QBD 189, 192.

15 *Sassoon v. Tokersey*, 28 B 616, 621; *Arjuns v. Harakchand*, 172 IC 812.

16 *Dayabhai v. Lakhmichand*, 9 B 358.

17 *Thacker v. Hardy*, 4 QBD 685, 695; 48 LJ QB 289, cited in *Richard v. Starck*, (1911) 1 KB 296, 302; *Chimanlal v. Nyamatrai*, 39 Bom LR 1083; *Marikar v. Bartleet*, 1942 PC 19.

proceeds of the sale of tickets and the party failing to appear on that day was to forfeit Rs. 500 to the other, the agreement was not a wagering one, since neither party stood to lose anything, i.e., was to be out of pocket in any way according to the result of the match. Even if a portion of the agreement be held to be a wagering contract, the clause providing for the payment of Rs. 500 is separable and, therefore, enforceable.¹⁸ An agreement to hand over certain documents relating to a pending suit on condition of payment of Rs. 750 if the suit be compromised, and of Rs. 3,000 if the suit be decreed in favour of the payer, is not one by way of wager.¹⁹ Where a person who was to pay a certain sum of money down was to win a very large sum in one event or to be returned the money advanced without interest, the transaction was held to be a wagering one.²⁰

There can be no wagering transaction unless there is a common intention to wager.¹ Whether a contract is a wagering one depends, therefore, upon the intention of the parties at the time when the contract was entered into. The mere fact that a contract is highly speculative is insufficient to render it void as a wagering contract.² A suit will not lie for the recovery of money deposited with a person on account of *satta* transactions by way of security.³ A contract may be ostensibly a sale but in reality a wager, e.g., where a horse is sold for £200 provided it trots 18 miles an hour, but if it cannot do so, for 1 s.⁴ A resale of goods bought is not a wagering transaction.⁵ A sale of a growing crop, the consideration being payable in kind at harvest, is not a wagering contract.⁶ *Nazarana* contracts in Punjab are not necessarily wagering contracts.⁷ An agreement for a walking match for £200 a side is a wager and is null and void.⁸ The husband has an insurable interest in his wife's life, it is not necessary to show a pecuniary interest in the husband.⁹ When a contract mainly depends upon a wager, no action can be maintained upon it, even if the action be for goods sold, when the parties had agreed that the price of the goods agreed to be sold by the plaintiff to the defendant should depend upon the result of such wager.¹⁰

3. **Agreements by way of wager.**—The meaning of the expression is the same as that of the corresponding words "agreements by way of wagering" in England. Where a certain class of agreements has indisputably been treated

18 *Babasaheb v. Rajaram*, 133 IC 254.

19 *Boppanna v. Kamalakara*, 156 IC 651.

20 *Richard v. Starck*, (1911) 1 KB 296.

1 *Arjan v. Walaiti*, 108 IC 58; *Bankey v. Bhagirath*, 1940 A 95.

2 *Narain v. Hanumantram*, 124 IC 453; *Sukdevdoss v. Gobindoss*, 55 IA 32 reftd to; fold in *Mohamed v. East Asiatic Co.*, 14 R 347; see *post*.

3 *Chhanga v. Sheo Prasad*, 42 A 449.

4 *Brogden v. Marriott*, 3 Bing NC 88.

5 *Rajmal v. Budansaheb*, 24 Bom LR 115; *Bisheshar v. Jwala*, 12 ALJ 817.

6 *Vithoba v. Sitaram*, 65 IC 324.

7 *Prithi v. Matu*, 1932 L 356.

8 *Diggle v. Higge*, 2 Ex D 422 *Trimble v. Hill*, 5 AC 342.

9 *Griffiths v. Fleming*, (1909) 1 KB 805; (1908-10) All ER Rep 760.

10 *Rourke v. Short*, 25 LJQB 196, fold in *Higginson v. Simpson*, 2 CPD 76.

as a wagering agreement in England it ought to receive the same treatment in India.¹¹

To constitute a wagering contract there must be proof that the contract was entered into upon terms that the performance of the contract should not be demanded, but only the difference in prices should be paid. There should be common intention between the parties to the wager that they should not demand delivery of the goods but should take only the difference in prices on the happening of an event.¹²

Wagering contracts though void are not forbidden by law and they are not opposed to public policy. Nor can they be said to be immoral.¹³

4. **Lottery.**—A lottery is not an arbitration. Every lottery, which may be defined as a distribution of prizes by lot or chance, necessarily involves agreements by way of wager between persons taking part therein. When a competition is decided by skill or judgment there is no lottery. Where no loss is necessarily hazarded there is no lottery. If the obtaining of property in suit is left to chance and depends on obtaining the "winning ticket", this is lottery and the agreement is void.¹⁴ A lottery is a game of chance in which the event, either of gain or loss of the absolute right to a prize, is wholly dependent on the drawing of lots.¹⁵ The purchase of a chance of winning a prize makes a thing a lottery. A scheme may be fairly regarded as a lottery if it is clear that whatever other benefit the subscriber or competitor may get in return for his money, the chance of his getting a prize also was a part of the bargain and must have entered into his calculation.¹⁶ A crossword puzzle, in which in good many instances a clue could be satisfied by only one single word, while in other instances it might apparently be satisfied by one or other of two or more alternative words, and the prize was to be awarded to the competitor whose solution corresponded most closely to a solution which had been already prepared by the editor, is a lottery.¹⁷ A picture puzzle competition has been held to be a game of skill.¹⁸ Where the purchaser of each packet of tea takes his chance of what prize he gets, this is lottery; the fact that every coupon entitles the holder to some prize and there are no blanks, or that the tea is worth the money paid for it, does not make it the less a lottery.¹⁹ Where the commission a man was to get depended not on his skill or labour but upon pure chance, the scheme was a lottery.²⁰ Where there is no invitation to the public, but the transaction is limited to a certain number of subscribers, each of whom gets his money's worth,

11 *Alamai v. Positive Government Security &c. Co.*, 23 B 191; *Kathama v. Dorasinga*, 2 IA 169, 186 reld to; *Kong Yee v. Lowjee*, 19 C 461, 469 PC.

12 *Gherulal v. Mahadeodas*, AIR 1959 SC 781, 784.

13 *Gherulal v. Mahadeodas*, AIR 1959 SC 781, 798.

14 *Kaluram v. Ram*, 3 IC 55.

15 *Maung San v. I. T. A. Club*, 38 IC 566; *Kamakshi v. Appavu*, 1 MHCR 448 cited.

16 *Sesha v. Krishna*, 70 MLJ 36 FB.

17 *Coles v. Odhams Press*, (1936) 1 KB 416; (1935) All ER Rep 598.

18 *Witty v. World Service*, 1936 Ch 808; (1935) All ER Rep 243.

19 *Taylor v. Smetten*, 11 QBD 207.

20 *Director v. Phillips*, (1935) 1 KB 391; (1934) All ER Rep 414.

it is not a lottery, though there is an element of chance in it.¹ Authority granted by the Government of India to conduct a lottery exempts a party from liability under the criminal law, but it remains a wagering transaction all the same.² A *chit* fund is not a lottery because by the arrangement all subscribers get a return of the amount of their contribution.³ But there are various forms of *chit* fund lottery. A prize *chit* transaction, in which the prize-winner, determined by drawing lots, is exempted from the payment on future transactions and who also gets a prize, is a lottery.⁴ The terms of a *chit* fund may be penal.⁵ A sweepstake is a lottery.⁶

5. **Dealings in differences.**—Wagering transactions may assume a variety of forms. A type with which the courts have constantly dealt with is that which provides for the payment of differences. Such a transaction comes within the mischief of the provisions of the section. In order to ascertain the real intention of the parties the Courts must look at all the surrounding circumstances and would go even behind a written provision in the contract to judge for itself whether such a provision was inserted for the purpose of concealing the nature of the transaction.⁷ In order to constitute a wagering contract neither party should intend to perform the contract itself but only to pay differences,⁸ that is to say, there must be, at the time of the contract, a common intention to deal only in differences,⁹ even though a party had the option to demand delivery.¹⁰ In such a case a party is not entitled to claim back his deposit.¹¹ The fact that the entries in the ledger are of mere differences between sale and purchase prices and not sale price and purchase price themselves, does not prove the transaction to be a wagering one.¹² To be a wager it is essential that both parties should have intended that delivery was not to be made.¹³ Such intention

1 *Durga v. Kedari*, 149 IC 489.

2 *Dorabji v. Lance*, 42 B 676.

3 *Narayana v. Vellachami*, 50 M 696 FB expld in *Universal &c. Assn. v. Thoppa*, 56 M 26 distgd. in *Sesha v. Krishna*, 70 MLJ 36 FB. The stakeholder undertakes extra risks and is entitled to heavier compensation, *Vaithinatha v. Govindasami*, 42 MLJ 551.

4 *Re. Udumalpet Nidi Ld.*, 57 M 844; *Sesha v. Krishna*, 59 M 562 FB, see cases reld to; see *Venkata v. Sanyasayya*, 66 MLJ 66.

5 *Ramalinga v. Meenakshi*, 47 MLJ 833; *Muthu v. Subramania*, 102 IC 14.

6 *Kashiteendra v. Madaneshwar*, 63 C 1234.

7 *Doshi Talakshi v. Shah Ujamsi*, 24 B 227; *Perosha v. Manekji*, 22 B 899; *Eshoor v. Venkatasubba*, 18 M 306; *Loknath v. Gopal*, 161 IC 713.

8 *Perosha v. Manekji*, 22 B 899; *Harnarayun v. Radhakisan*, 75 IC 906; *Kong Yee v. Lowjee*, 28 IA 239; *Bhagwandas v. Burjorji*, 45 IA 29; *Manilal v. Allibhai*, 47 B 263; *Ganesh v. Har*, 138 IC 542; *Ramdin v. Mansaram*, 51 A 1027.

9 *Sukhdevdoss v. Govinddoss*, 51 M 96 PC, *Mohamed v. East Asiatic Co.*, 14 R 347; *Chimanlal v. Nyamatrai*, 39 Bom LR 1083; *Rangasa v. Hukumchand*, 120 IC 406, a subsequent agreement is immaterial.

10 *Shewkissen v. Mangal*, 1941 C 341.

11 *Ram v. Govind*, 1944 A 196.

12 *Khimji v. Bhanji*, 1950 Kutch 24.

13 *Ganesh v. Har*, 138 IC 542; *Bashiram v. Ram*, 154 IC 384; *Arjuna v. Harakchand*, 172 IC 812; *Marikar v. Mel*, 1946 PC 63.

is a question of fact. There can hardly be any direct evidence of it.¹⁴ Two parties may enter into a formal contract for the sale and purchase of goods at a given price and for their delivery at a given time, but if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between each other, according to as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the rise and fall of the market.¹⁵ When there are two contracts, one for sale and the other for purchase, of the same amount and relating to the same class of goods, the intention of the parties is that the contracts shall cancel each other and there shall arise on the due date only a limited liability to pay or receive differences.¹⁶ If there be no common intention from the beginning to pay differences only, the transaction will not be a wagering one.¹⁷ If to a wagering agreement for difference there is superadded an option by the purchaser of purchasing the stock that is nonetheless an agreement for wagering.¹⁸ There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive difference may arise on the happening of a particular event, the contract is void as a wager if that event does not happen.¹⁹ Where a contract provides that if before its maturity either party shall suspend payment or become insolvent, the other party shall close the contract; when the contract is thus closed the measure of damages shall be the difference between the market price current at the time of closing and the rate named in the contract; to close the contract as above provided is to pay differences and nothing else; therefore, it is a contract by way of wager and void, and nonetheless because it is agreed that under other circumstances the contract is to do that to which no exception can be taken.²⁰ Where a transaction for the purchase and sale of Government securities was entered into through a common broker and each party made inquiries of the broker, not whether the other would be able to deliver the Government paper, but whether he would be able to pay differences, the contract was for the payment of differences only.¹ The fact that the plaintiff took not the market rate but the rate fixed by the Marwari *panch* as the measure of his damages seemed to the court to afford a plain indication that the parties never intended to pass property in actual goods.² A *satta* transaction is not a gambling transaction if either party intends to make

14 *Chimanlal v. Nyamatrai*, 39 Bom LR 1083.

15 *Kong Yee v. Lowjee*, 29 C 461, 467, PC; see *Kishindas v. Menghraj*, 81 IC 834. It will be wager even if property were to pass under certain circumstances, if the main intention be to pay differences. *Universal Stock Exchange v. Strachan*, 1896 AC 166; (1895-99) All ER Rep 75 refd to in *Perosha v. Manekji* 22 B 899, 903; *Baldeo v. Lolit*, 25 IC 747; *Govindoss v. Sukdedoss*, 93 IC 169; *Ironmonger v. Dyne*, 44 TLR 497; *Firm Ram v. Firm Mutsaddi*, 1942 A 170..

16 *Ramgopal v. Ramdas*, 148 IC 1038.

17 *Balvant v. Mishrilal*, 26 Bom LR 1194.

18 *Re Gieve*, (1899) 1 QB 794.

19 *Joshi v. Mathuradas*, 34 B 519.

20 *Chapey v. Gill*, 7 Bom LR 805.

1 *Eshoor v. Venkatasubba*, 18 M 306; *Tod v. Lakhmidas*, 16 B 441 distgd.

2 *Motilal v. Govindram*, 30 B 83, 96.

delivery.³ The general character of the plaintiff's business, namely, that no delivery was given but differences were paid or received, will give rise to the presumption that the agreement was for differences only.⁴ Where the transactions in question were extravagantly out of proportion to the genuine commercial resources of the parties the presumption of wagering arises, so also where out of a large contract delivery is given of a very small quantity; the form of the contract does not finally determine its nature.⁵ There is no wager even if a large portion of the goods contracted for is not delivered.⁶

The court must be careful not to be misled by the mere rectitude of the documents evidencing the transaction, or the mere protestation of one of the parties as to his intention. If the court is satisfied that when the parties entered into the agreement before it both of them intended neither to take or give delivery, but merely intended to adjust the transaction on the due date or dates by the payment or receipt of differences, as the case may be, then the court should hold that the transactions were mere agreements by wagers and as such void in law.⁷ "In this class of suits it would be almost idle to expect to get at the truth unless the court takes the widest possible outlook consistent with the provisions of the Evidence Act; otherwise the result would be that the statute could be violated with impunity by the simple and habitual device of cloaking wagers in the guise of contracts".⁸

In order to establish that a contract is one of wagering, it is not sufficient for the defendant to show that neither party intended or contemplated that there should be any delivery of goods. He has to show further that there was an agreement that neither party would have the right to make or demand delivery.⁹

6. **Speculative transactions.**—Speculative contracts are not wagering agreements unless it be the intention of both the parties, at the time of entering into the agreements, under no circumstances to call for or give delivery from or to each other. There is no law against speculation as there is against gambling. The *modus operandi* in one class of speculative transactions is, after having entered into a contract of purchase, to sell again the same quantity, in one or more contracts, either to the original vendor or to someone else, so as to secure the profit or to ascertain the loss.¹⁰ In *Hazari Lal v. Keshab Das*,¹¹ forward

3 *Jahan v. Hardak*, 1935 A 247.

4 *Eshoor v. Venkatasubba*, 18 M 306.

5 *Motilal v. Govindram*, 30 B 83, 92; *Doshi v. Shah Ujamshi*, 24 B 227.

6 *Bhagwandas v. Burjorji*, 45 IA 29.

7 *Hurmaukhray v. Narotamdas*, 9 Bom LR 125, 137; *Jessiram v. Tulsidas*, 37 B 264; see *Sri Newas v. Ram*, 43 A 585.

8 *Motilal v. Govindram*, 30 B 83, 99; *Doshi v. Shah Ujamshi*, 24 B 227, 230; *Perosha v. Manekji*, 22 B 899, 903; *Vithalsa v. Raoji*, 151 IC 63; *Loknath v. Gopal*, 161 IC 713.

9 *Kundan v. Qadir*, 78 IC 966.

10 *Tod v. Lakhmidas*, 16 B 441; so also forward contracts settled by cross sales and purchases are not wagers; *Meghji v. Jadowji*, 12 Bom LR 1062, the magnitude of the business and the capacity of the parties will furnish a test; *Lakshmi v. Bala*, 1938 L 825.

11 21 ALJ 153.

contracts in sugar were held to be speculative and not wagering transactions. The bare fact that a contract is a highly speculative forward contract does not show that it is necessarily a wagering agreement,¹² because there may be a real desire on the part of the vendor to sell and of the buyer to purchase the goods agreed to be sold at the contract rate.¹³ Thus, an agreement for the sale of yen to be delivered at a specified period at a fixed rate is a valid contract.¹⁴ When persons who are in a position to carry out a contract agree to receive or deliver goods at a future date, such contracts are not necessarily wagering contracts because an element of speculation enters into them, even if the contract provides for the alternative of receiving or paying only differences instead of for actual delivery.¹⁵ A *bandi* transaction is not necessarily a transaction of a wagering nature any more than any other speculative transaction to which parties may enter.¹⁶ When transactions are entered into through the medium of a broker according to the usage of a particular market, there is a very strong presumption against the existence of a common intention to wager. But this presumption can be rebutted by evidence.¹⁷ In cross contracts for the same amounts of the same goods the intention generally is to pay differences.¹⁸ A contract between D and P that P should engage in speculation on the rise and fall of prices of goods on behalf of D by entering into forward contracts for the purchase and sell of oilseeds with third parties is not a wagering contract.¹⁹

7. *Teji mandi contracts*.—There are three common forms of speculations in Bombay. They are known respectively as *Teji-Mandi*, *Teji* and *Mandi*. Speculation in each case is based upon the difference between the contract price and the market price on the day of settlement. They are in the nature of forward contracts. They have been explained by Kincaid J. in *Manubhai Premanund v. Keshavji Ramadas*.²⁰ From the mere fact that a contract is a *teji* or *mandi* or *teji-mandi* contract it cannot be held as being a wager, but the fact that it is in the nature of a wager has to be proved, namely, that the common intention of the contracting parties at the time of the contract was only to deal in differences and under no circumstances to call for or give delivery.¹ In other words, there is no presumption that *teji-mandi* transactions are wagers. In the absence of any evidence to the contrary they should be treated as genuine contracts.² In

12 *Gopal v. Dhani*, 118 IC 646; *Narain v. Hanumantram*, 124 IC 453; *Shewkisseen v. Mangal*, 1941 C 341.

13 *Narayan v. Maheshi*, 79 IC 578; *Ally v. Esmail*, 90 IC 676.

14 *Jamal v. Yokohama S. Bank*, 163 IC 516.

15 *Sri Newas v. Ramdas*, 43 A 585.

16 *Ajudhia v. Lalman*, 25 A 38.

17 *Chimanlal v. Nyamatrai*, 39 Bom LR 1083; *Dady v. Madhuram*, 5 Bom LR 768.

18 *Ramgopal v. Ram*, 1934 B 91.

19 *Firm Pratapchand v. Firm Katrika*, AIR 1975 SC 1223.

20 AIR 1922 Bom 66.

1 *Manilal v. Allibhai*, 47 B 263; *Manubhai v. Keshavji*, 1922 Bom 66; *Dhunji v. Pokermall*, 24 IC 441; *Lakshmi v. Bala*, 1938 L 825.

2 *Sobhagmal v. Mukundchand*, 53 IA 241 *reld to in* *Ram Prasad v. Ramji*, 50 A 115; *Narandas v. Ghanashyam*, 147 IC 412. The view expressed in *Jessiram v. Tulsidas*, 87 B 264 may be considered to be overruled.

the case of a *teji-mandi* contract entered into by a *pakka adatiya* on behalf of a constituent, the *pakka adatiya* is not bound, without further instructions, to exercise an option on behalf of the constituent. A *teji-mandi* contract is one between two parties as principals; the contract is that one party tells the other that he wants to buy the right to declare himself either a purchaser or a seller on a certain date.³ In such a contract one party buys what is known as a double option. For this he pays a certain sum, say, Rs. 20, per Rs. 100. On the settling day the buyer has the right to declare himself either a seller or a buyer. If the market falls he will declare himself a seller, if it rises he will declare himself a buyer.⁴

8. **Contracts through agents.**—It does not follow that because a wagering agreement is void, contracts collateral to it cannot be enforced. According to the Bombay Act III of 1865 agreements collateral to or in respect of wagering transactions cannot support a suit.⁵ An agent who has paid wagering losses for his principal is entitled to recover them as also his commission.⁶ A customer gambling through a broker cannot set up a plea of gaming and wagering against the broker's claim.⁷ The reason is that "neither party stands to win from or to lose to the other according to the fluctuation of the price or any other event. The essence of a wager between them is absent".⁸ But the agent must have acted in the character of an agent. Thus, where the plaintiff sued the defendant on a balance of account on a series of transactions, alleged to have been made by the defendant through the plaintiff, the suit was dismissed on the ground that the transactions were wagering transactions, as the plaintiff was not regarded as having acted merely as agent.⁹ The section does not bar a suit against an agent or trustee in receipt of prize money won on a wagering transaction on behalf of the principal.¹⁰ Where a person advances money to another for betting on a joint account the person advancing the money can recover half the amount lost.¹¹ But where a sum of money was deposited by the plaintiff with the object that the defendant would enter into wagering agreements on behalf of the plaintiff, the sum was held not to be recoverable.¹²

An agent or trustee cannot retain the money won on bets but the principal or *cestui que trust* may recover the sum by suit.¹³ An agent cannot plead the

3 *Baldeo v. Radhakishan*, 1939 B 225.

4 *Manubhai v. Keshavji*, 1922 Bom 66.

5 *Shibho Mal v. Lachman Das*, 23 A 165.

6 *Shibho Mal v. Lachman Das*, 23 A 165; *Jagat Narain v. Shri Kishan*, 33 A 219; *Bisheshar v. Jwala*, 36 A 426; *Bidhicand v. Kachhu*, 45 A 503; *Chekka v. Gajjala*, 14 MLJ 326; *Ghasiram v. Jailal*, 13 IC 319; *Behari v. Prabhu*, 79 PR 1908; *Ally v. Esmail*, 90 IC 676; *Mutsaddi v. Bhagirath*, 115 IC 424; *Pirithi v. Mamchand*, 156 IC 539.

7 *Goaldas v. Manick*, 1941 C 125.

8 *Sobhagmal v. Mukund*, 51 B 1 PC, cited in *Daya Ram v. Murli Dhar*, 49 A 926.

9 *Hira Lal v. Sri Ram-Briji*, 86 IC 656.

10 *Khitendra v. Madan*, 1937 C. 297.

11 *Saffery v. Mayer*, (1901) 1 QB 11.

12 *Chhanga v. Sheo Prasad*, 18 ALJ 513; S 65 held not to apply.

13 *Bridger v. Savage*, 15 QBD 363; (1881-85) All ER Rep 1065; *Kohitsendra v. Madaneshwar*, 63 C 1234; *Muthu v. Veera*, 70 MLJ 433.

illegality of an agreement as a defence to an action brought by the principal to recover from the agent a sum of money received by him from the principal by way of security.¹⁴ In the Bombay Presidency, however, the decision would be different as it rests on a special Act.¹⁵ Even in respect of a wagering agreement, a party, who acts as a broker and enters into genuine contracts, *e.g.*, for the purchase and sale of shares in order to enable the defendant and a third party to gamble in differences, is entitled to recover commission and charges.¹⁶ A trustee in bankruptcy in a case where the bankrupt has made a wagering contract and has won the wager cannot come forward and claim the amount as his winnings.¹⁷ The relationship between *pakka adatias* and their constituents is not one of principal and agent but of principal and principal.¹⁸ They are personally responsible and both the buyers as well as the sellers look to the *adatias* for the fulfilment of the contracts.¹⁹ As to the main incidents of the relationship between a *pakka adatia* and his constituent, see *Ram v. Kaku*.²⁰ There is no privity between his constituent and the third party with whom a *pakka adatia* deals.¹ The contract with a *pakka adatia* would be one of wager when there is no provision for delivery but only for payment of difference.² A *pakka adatia* operating in the Bombay market is nothing but a commission agent. He sells or purchases commodities for future delivery on receipt of orders from his up-country constituents; supposing he buys cotton from B for future delivery on receipt of an order from his constituent. He will again sell it to B as the date of delivery approaches. The contract between him and B is thus cancelled out. If he incurs any loss, he will recover the same from his constituent. If he makes any profit, he will hand over the same to his constituent. Similarly he may sell cotton at the request of his constituent. The incidents of *pakka adatia* dealing are that the *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant, that no contractual privity is established between the constituent and the Bombay merchant, that the constituent has no indefeasible right to the contract made by him (*i.e.*, *pakka adatia*) on receipt of the order and that he may enter into a cross contract with the Bombay merchant and thereby cancel the original contract.³

9. **Collateral Agreements.**—A collateral agreement based upon a transaction which was originally a wagering transaction is not on that account illegal.⁴

14 *Hardeo Das v. Ram*, 49 A 438; *Bholanath v. Mul Chand*, 25 A 639; *De Mattos v. Benjamin*, 63 LJQB 248; *Bridger v. Savage*, 15 QBD 363: (1881-85) All ER Rep 1065.

15 *Dayabhai v. Lakhmichand*, 9 B 358.

16 *Weddle Beek & Co. v. Hackett*, (1929) 1 KB 321: (1928) All ER Rep 539.

17 *Shoolbred v. Roberts*, (1900) 2 OB 497.

18 *Harnarayan v. Radhakishan*, 75 IC 906.

19 *Jot Ram v. Jiwan Ram*, 139 IC 637.

20 1950 EP 92 FB See also *Bhugwandas v. Kunji* 30 Bom 205.

1 *Ram v. Ugger*, 1942 S 115.

2 *Harcharan v. Jai*, 1940 A 182; *Firm Ram v. Firm Mutsaddi*, 1942 A 170; *Burjerji v. Bhagwandas* 38 B 204; on appeal 45 IA 29.

3 *Bhagwandas v. Kanji*, 30 Bom 205; *Dhruv v. Gulabray*, 1954 Sau 99.

4 *Banvard v. Moola*, 7 Rang 283; *Hira v. Sriram* 86 IC 656.

Money lent for the purpose of gambling,⁵ or for the purpose of paying off a gambling debt with the knowledge of its being applied for the payment of such a debt, is recoverable.⁶ No suit will lie on a contract the consideration of which is furnished by the proceeds of a gambling transaction, but under English law money deposited with a broker as a cover to secure him against any probable loss is recoverable.⁷ Where a *hundi* was drawn in favour of the plaintiff firm in consideration of the firm withdrawing the drawer's name from the Turf Club, thereby preventing his being posted as a defaulter, the plaintiff firm was held entitled to recover on the *hundi*.⁸ The consideration of a *hundi* is good even if it is for the payment of a gambling transaction.⁹ Where one of several holders of a Derby Sweep Ticket sold half of his share to another, the other could enforce his claim in the prize by suit.¹⁰

There are some transactions in which the parties might lose or gain according to the happening of a future event, which do not fall within the scope of wagering contracts. Such transactions include the majority of forward purchases and sales. A certain class of agreements, such as bets, come within the expression "agreements by way of wager". Others, such as legitimate forms of life insurance, do not, though looked at from one point of view they appear to come within the definition of wagers. The distinction is doubtless a subtle one and probably lies more in the intention of the parties than in the form of the contract. An insurance on the life of a stranger comes within the definition of a wager.¹¹ A person using a motor vehicle belonging to another can take a policy of insurance in his own name against third party risk, and the contract between him and the insurer cannot be regarded as a wagering contract. The payment by the insurer is not based on a stake.¹²

10. **Effect of a wagering contract.**—Wagers are not favoured by law. Agreements by way of gaming and wagering, in this country as well as in England, are void and not illegal.¹³ There is a difference between agreements that are void and those that are illegal in the effect which their peculiar character imparts to collateral transactions. Though the original contract is void, the plaintiff can recover from a third party who has received the money on his behalf. A contract of betting is not illegal but void, therefore, the principal can recover the money won in betting and paid to the agent. But no action can be founded on or arise out of an illegal agreement, *i.e.*, where the original contract is for a consideration the receipt of which renders the receiver

5 *Subbaraya v. Devandra*, 7 M 301; *Pringle v. Jafar*, 5 A 443; *Praglal v. Ratanlal*, 181 IC 546; *Shankar v. Dittu*, 99 IC 875.

6 *Bani Madhab v. Kaunsal*, 22 A 452.

7 *Re Cronmire*, (1898) 2 QB 383.

8 *Leicester v. Mullick*, 27 CWN 442; *Re Browne*, (1904) 2 KB 133; 73 LJ KB 446.

9 *Ghasiram v. Jailal*, 13 IC 319.

10 *Gough v. Lenehan*, 25 IC 355.

11 *Alamai v. Positive Government Security*, 23 B 191.

12 *Northern & Co. Ins. Co. v. Kanwarjit Singh*, AIR 1973 All 357, 360.

13 *Juggernath v. Ram*, 9 C 791; *Perasha v. Manekji*, 22 B 899; *Mitchell v. Tennent*, 52 C 677; *Saaby v. Fulton*, (1909) 2 KB 208; (1908-09) All ER Rep 857; *Dayabhai v. Lakhmichand*, 9 B 358.

liable to a penalty.¹⁴ An arbitration clause contained in a wagering contract,¹⁵ or arising out of a gaming or wagering transaction,¹⁶ is part of the contract and is, therefore, equally unenforceable with the contract of wager itself. A winner in a wager is prevented from recovering by suit the money either from the other party to the agreement or from the stake-holder.¹⁷ But the loser of a bet is entitled to recover his deposit, provided the plaintiff demands its return before the stake-holder has paid it over to the winner. But no suit will lie for recovery of the money from the winner after it has been paid over to him.¹⁸ Money paid to satisfy the liabilities of another on a betting account can be recovered by him from that other person, the consideration not being unlawful.¹⁹ But it has since been held by the Privy Council that where the consideration for a promissory note is the loss sustained by a party on a wagering transaction, a suit will not lie for recovery of the money due on the promissory note, it being regarded as made without any consideration.²⁰ In the absence of proof that at the time of entering into the original agreement the understanding of both parties was that it was merely for the payment of differences, the contract between the parties cannot be held to be void.¹ Under the Bombay Act 3 of 1865 no suit will lie at the instance of the loser to recover the deposit from the stake-holder.² In respect of a wagering agreement which is void no specific relief will be granted by the court.³ Even if an agreement be by way of wager, if the plaintiff has paid the defendant's share of the loss he is entitled to recover it from the defendant, as this section does not affect agreements or transactions collateral to wagers.⁴

11. **Exceptions.**—The Exception is confined to the cases of prizes, etc., to be awarded to the winner. There can only be a winner when two or more persons are to compete in doing something. When the horse of one person was to get a sum in a certain event it was a bet and nothing else.⁵ In this connection it may be useful to refer to S. 294A of the Indian Penal Code.

14 *Hormasji v. Po.*, 51 IC 530, see cases reld. to.

15 *Karuna v. Lankaran*, 60 C 856.

16 *Lee v. Dalmeny*, (1927) 1 Ch 300.

17 *Ratnakalli v. Vachalapu*, 109 IC 377; *Re Uppasini*, 52 MLJ 179.

18 *Maung Po. v. Aung*, 3 Rang 543; *Diggle v. Higge*, 2 Ex D 422, *Trimble v. Hill*, 5 AC 342; *O'Sullivan v. Thomas*, (1895) 1 QB 698; *Barclay v. Pearson*, (1893) 2 Ch 154, 168; *Bate v. Cartwright*, 7 Price 540; Halsbury 4th ed., Vol. 9, Para 681.

19 *Pringle v. Jafar*, 5 A 443.

20 *Kong Yee v. Lowjee*, 28 IA 239; *Doshi v. Shah Ujamsi*, 24 B 227; see *Perosha v. Manekji*, 22 B 899.

1 *Venkata v. Venkata*, 17 M 496.

2 *Ram v. Gangabison*, 12 Bom LR 590; *Dayabhai v. Lakhmichand*, 9 B 358.

3 *Dorabji v. Lance*, 42 B 676.

4 *Sanehiram v. Surajmal*, 69 IC 769; *Bhagwandas v. Burjojri*, 45 IA 29.

5 *Batson v. Newman*, 1 CPD 573.

CHAPTER III

OF CONTINGENT CONTRACTS

31. "Contingent contract" defined. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustrations

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

What is a contingent contract.—A contingent, or as it is called in English law, a conditional, promise is distinguished from an absolute promise by the fact that the performance of the contract becomes due on the happening of a condition or contingency, so it is not due immediately on the making of the contract.⁶ If a person agrees to sell his agricultural land after obtaining necessary permission from the Collector, which is granted almost as a matter of course on the fulfilment of certain formalities, the contract cannot be said to be contingent.⁷ The circumstance that the agreement is contingent till the event happens does not, after the event has occurred, affect the validity of the contract. A contingent agreement is not enforceable till the event on which it was to depend has arisen; but when that event has occurred, the contract, for all purposes, rests on the same footing as if it had been made positively and without reference to any contingency.⁸ The uncertain event on the happening of which the contract is conditional must be collateral to the contract. This means that it must not form part of the consideration of the contract but must be independent of or ancillary to it. Where it forms part of the consideration, as in reciprocal promises, the case is governed by Ss. 51 *sq.* The event or condition must not be a certainty. Thus in the case of a contract of fire insurance, such as is given in the illustration to the section, A contracts to pay B Rs. 10,000, no doubt for a consideration which is not mentioned, *e.g.*, a quarterly or yearly payment of a sum of money by B, if B's house is burnt. The consideration of the promise to pay Rs. 10,000 is the payment by B, but the contract to pay Rs. 10,000 will be enforceable only on the happening of an uncertain event, *viz.*, on B's house being burnt down, an event which is independent of the consideration. The condition,⁹ therefore, should be distinct from consideration. A liability under a lease or under a building contract¹⁰ may be conditional on the

6 See Leake, *Contract*, 8th Ed. p. 473.

7 *Pahunchi Lal v. Man Singh*, AIR 1971 All 444, 447-8.

8 *Regent's Canal v. Ware*, 23 Beav 575, 586; see Halsbury, 4th ed. Vol 9, Para 264.

9 *Coombe v. Greene*, 12 LJ Ex 291.

10 *Kimbers v. I. R. Commissioners*, (1936) 1 KB 132: (1935) All ER Rep 609.

appointment of a surveyor and until a surveyor is appointed no liability arises. Readiness and willingness to appoint a surveyor is not enough. A contract for the sale of land, and a contract, on the same day, conditional on the completion of the contract sale, to build a house on the land, are two contracts.¹¹ An agreement between parties that should the plaintiff be successful in his suit with regard to certain lands in the possession of the defendant, then the plaintiff would purchase the land for Rs. 300 has been held to be a contingent contract to purchase and not a wagering contract.¹² The condition may be implied, *e.g.*, upon the letting of a furnished house it is an implied condition that it is in a fit state for occupation.¹³ It is not always easy to determine whether a promise is absolute or conditional.¹⁴ Thus, a promise to pay a sum of money may be either absolute or conditional in the sense that the creditor will be entitled to be paid if the condition be performed, *e.g.*, if a certain fund be raised.¹⁵ In order to make the contract conditional in such a case it is not enough that a particular fund should be pointed out for payment, but the raising of the fund must be made a condition precedent to the liability for the repayment of the debt. Thus, a policy of insurance containing a proviso that the capital and other property of the company, remaining unapplied at the time of demand, should alone be liable to make good the claim, and that no director or shareholder be personally liable beyond the amount of unpaid shares in the capital stock in the company, limits the liability of the director or shareholder to the amount unpaid on his share.¹⁶ But borrowing money upon an agreement that it was "to be repaid out of the calls on shares" did not exonerate the borrower from liability to repay if no calls were made, that provision being simply a provision for the *time* of payment.¹⁷ Where a vessel was chartered to proceed to a 'safe port' and it was stipulated that the master could refuse to sail for a port which was not 'safe' for the steamer to lie, there was no breach of charter-party on the master refusing to sail to a port which was not "safe".¹⁸ A promise of increment of salary is conditional on the servant remaining in service. The promise is no bar to his dismissal.¹⁹ In the case of a particular gift the reference to the donee in the deed was held to be merely descriptive and not intended to be dependent on the validity of the marriage, nor was there any implied condition that the gift was to be affected by the subsequent unchastity of the donee.²⁰

A contingent contract is a contract after all, and has to be distinguished

11 *Hunt v. Bishop*, 22 LJ Ex 337.

12 *Ismail v. Daudbhai*, 2 Bom LR 188.

13 *Wilson v. Hatton*, 2 Ex D 336; *Collins v. Hopkins*, (1923)2 KB 617; (1923) All ER Rep 225.

14 *Vissanji v. Shapurji*, 36 B 387 PC.

15 *Pilbrow v. Pilbrow's Atmospheric Ry.*, 17 LJCP 166; 136 ER 950; *Pearson v. D. & S. E. Ry.*, 1909 AC 217; Leake 475.

16 *Ex. p. Prince of Wales Assurance Co.*, 28 LJ Ch 335.

17 *Scott v. Ebury*, LR 2 CP 255.

18 *Graham v. Mervanji*, 5 B 539.

19 *Volkart v. Kundu*, 1932 L 602.

20 *Gopal v. Sita*, 34 BLR 470.

from a case where there is no concluded contract but only an offer has been made by one party which has not been accepted by the other. Thus, where a house was put up for sale, the first defendant was the highest bidder, but the sale was subject to a stipulation that it would be confirmed on receipt of the Collector's order and after a long delay the Collector refused to confirm the sale, held there was no contract.¹ A recent example is the case of *Aberfoyle Plantations Ltd. v. Cheng*,² where P agreed to buy a plantation part of which was held under a lease which had already expired. The agreement provided that the purchase was conditional on the vendor obtaining a renewal of the lease, and that the agreement would become null and void if the vendor proved unable to fulfil this condition. The vendor having failed to obtain the renewal it was held that there was no contract. But where the parties reach an agreement on all essential matters but the agreement is dependent upon the approval of the court it cannot be said there is no binding contract till judicial approval is obtained.³ Where a negative condition has been prescribed, it is deemed to be satisfied if the existence of the fact has been rendered impossible.⁴ A condition may be a condition subsequent. It is a question of construction whether a condition is a condition precedent or a condition subsequent.⁵ A covenant in these terms "If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs" was held to be a complete and not a contingent contract.⁶ "A distinction is drawn in law between a condition precedent and a condition subsequent." Where a certain act has to be performed or a certain event is to happen before the contractual obligation can be fixed, this act or event is a condition precedent. Such is an undertaking in a contract of lease that the lessor shall build a new warehouse and put an old warehouse in repair.⁷ So, where a railway company purchases land for the proposed railroad, there may be a condition precedent that the railway shall be made.⁸ Where by a statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned.⁹ Where A purchases the copyright of B's book of medicinal prescriptions with a view to starting a company for the manufacture of medicines and makes a part payment for the book, the contract is not contingent on the formation of the company, and B can sue for the balance even if the company is not formed.¹⁰ Where the owner of a plot of land agrees to sell the plot after

1 *Muthu v. Secretary of State*, 45 MLJ 67; see *Pym v. Campbell*, 6 E & B 370: 25 LJ QB 277, cited in *Pattle v. Hornibrook*, (1897) 1 Ch 25.

2 (1959) 2 All ER 910. See *Re Longlands Farm*, (1968) 3 All ER 552.

3 *Smallman v. Smallman*, (1971) 3 All ER 717.

4 *Rai Ram v. Hill*, 1949 FC 135.

5 *Motilal v. Thakoral*, 36 B 557; *Re Jaunpur Sugar Factory*, 89 IC 438.

6 *Venkatachalam v. Sethuram*, 56 M 433 FB, *Sakalaguna v. Chinna*, 51 M 533 PC fold.

7 *Counter v. Macpherson*, 5 Moo PC 83.

8 *Gage v. Newmarket Ry.*, 18 QB 457.

9 *Nathulal v. Phoolchand*, AIR 1970 SC 546.

10 *Bashir Ahmad v. Andhra Pr. Govt.*, AIR 1970 SC 1089.

obtaining a sanad from the Government within 4 months, the agreement is not contingent.¹¹ Where, on the other hand, a valid contract is formed in the first instance, but it is stipulated that the contract shall be annulled if a certain act be not performed or a certain event do not happen, that is a condition subsequent, the non-fulfilment of which discharges the contract. A leasehold not transferable without the lessor's consent may be sold subject to such consent being obtained,¹² or an equity of redemption may be assigned subject to the mortgagee's consenting to allow the mortgagor to remain for a specified period.¹³ If P, under a hire-purchase agreement, let a car to D, who is to pay 24 monthly instalments and the payment of instalments is made dependent upon the delivery of the log-book by P to D, the obligation to pay the instalments cannot be enforced if the log-book is not delivered. D is relieved of the obligation to pay not because there was no contract between P and D, but because P failed to fulfil the condition precedent. But in *Bentworth Finance Ltd. v. Lubert*¹⁴ from which the above facts have been taken, the Court of Appeal held that D was relieved of his obligation as there was no contract at all until the log-book was supplied.

Life insurance comprises any contract in which one party agrees to pay a given sum upon happening of a particular event contingent upon the duration of human life in consideration of periodical payments of premium.¹⁵

32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Contingent contracts.—On a contract for the purchase of land subject to the approval of the title by the purchaser's solicitor, the absence of approval by the solicitor will be conclusive if the purchaser or his solicitor had not acted unreasonably or with *mala fide*.¹⁶ But a doubtful title with an indemnity cannot

11 *Balwant Singh v. Rajaram*, AIR 1975 Raj 73.

12 *Day v. Singleton*, (1899)2 Ch 320.

13 *Smith v. Butler*, (1900)1 QB 694.

14 (1967)2 All ER 810.

15 *Chandulal v. I.T.C.*, AIR 1967 SC 816.

16 *Hudson v. Buck*, 7 Ch D 683; 47 LJ Ch 247; see *Eadie v. Addison*, 52 LJ Ch 80; 47 LT 543.

be forced on the purchaser.¹⁷ An agreement by an undivided co-sharer to sell his share, on allocation to him of his share by the joint owners, comes under this section. A contract for the resale of property on payment of a certain price by the vendor is in the nature of a conditional contract which becomes absolute as soon as the option of re-purchase is exercised. An agreement to do an act by a third person, though dependent entirely on his will, is binding.¹⁸ Where a contract for the supply of coal contained a clause that "in the event of the ship being lost, this contract will be null and void," and the ship was sunk by collision and remained under water for 16 hours the defendants were held not liable under the contract.¹⁹ A valid ante-nuptial promise made in consideration of marriage becomes binding on the marriage taking place.²⁰ A stipulation in a contract that the passing of the goods supplied shall be "final as regards both measurement and quality" is not satisfied by mere approval of the goods unless the mind is properly applied to the subject.¹ It is often provided in a policy of insurance that such proof of claim is to be furnished "as the directors shall think necessary to establish that claim." This means such evidence or information is to be furnished as they might reasonably to their satisfaction and not such as they might unreasonably or capriciously require.² A stipulation in a policy of insurance that "I warrant that I shall not commit suicide within one year" is a condition the breach of which may prevent the recovery of the insurance money.³ Where the possibility of completing a contract is dependent on the consent of a third person, if the consent cannot be procured the defendant cannot be decreed to obtain it. Where the future event provided for in a contingent contract becomes impossible the contract falls through.⁴ A contract may be conditional upon the approval of a third party. Where a builder's agreement provided that the owner was to pay for any building to the contractor upon receiving an architect's certificate that the work was done to his satisfaction, the production of the certificate was a condition precedent to the bringing of the action and the mere checking of the builder's charges did not amount to a certificate.⁵ The owner is not liable if the certificate be wrongfully withheld by the architect, but the owner will be liable if he colludes with the architect and causes the certificate to be withheld.⁶

17 *Ross v. Boards*, 8 A & E 290.

18 *Kirpal v. E. Estates*, 1936 S 26; *Sardar Arjun v. Sahu*, 1950 A 32; *Pillai v. Mudaliar*, 1950 M 697.

19 *Nusserwanji v. Volkart Bros.*, 13 B 15.

20 *Ma Tin v. Byaw*, 117 LC 242.

1 *Bombay Burmah Co. v. Aga Mahomed*, 38 IA 169.

2 *Braunstein v. Accident Death Insurance Co.*, 1 B & S 782; *Scott v. Avery*, 5 HLC 811: (1843-60) All ER Rep 1; approved in *Board of Trade v. Cayzer Irvine & Co.*, 1927 AC 610.

3 *Edinger & Co. v. Mutual Life Insurance*, (1905) 1 KB 31.

4 *Shardaprasad v. Sikandar*, 34 IC 461.

5 *Morgan v. Birnie*, 9 Bing 672; *Eaglesham v. Mc. Master*, (1920) 2 KB 169: (1920) All ER Rep 674.

6 *Clarke v. Watson*, 18 CBNS 278: (1861-73) All ER Rep 482; *Battenbury v. Vyse*, 82 LJ Ex 177; see *Secretary of State v. Arathoon*, 5 M 173.

The position of such an architect is not exactly that of an arbitrator.⁷ A payment may be conditional on demand. Thus, a demand upon a banker is necessary before he comes under an obligation to pay his customer the amount standing to the latter's credit in his current account.⁸ When there is a covenant not to do a thing 'unless' or 'except' upon payment, in order to maintain an action payment must be negatived.⁹ A promissory note payable on demand is a present debt and is payable without any demand.¹⁰ Where contracts are conditional upon arrival of goods, their delivery is excused if the goods do not arrive.¹¹ It is the duty of an agent to be constantly ready with his accounts, but this means that the agent must be ready to render them when they are demanded. He is not liable to pay interest unless he has improperly withheld accounts and refused to pay over the money in his hands when demanded or has delivered fraudulent accounts.¹² But a creditor need not make any demand for the repayment of a debt whether it is for money borrowed or for goods delivered.¹³ Where, however, the sum is uncertain in amount, in the sense that it would have to be ascertained by reference to matters better known to the party claiming than to the party in default, it must be demanded before proceedings can be taken for its recovery.¹⁴ If a debtor promises to repay a debt when he is able to do so, the creditor's right to sue for the recovery of the debt becomes complete when the debtor becomes able to pay.¹⁵ The express or implied obligation of seaworthiness is neither a condition nor a warranty but one of that large class of contractual undertakings one breach of which might have the effect ascribed to a breach of "condition" under the Sale of Goods Act, 1893, and a different breach of which might have only the same effect as that ascribed to a breach of "warranty".¹⁶

Whether a promise to do a particular thing conditional on the happening of an uncertain event requires notice of that event, the rule has been thus laid down: "The result of the cases seems to be that no notice can be insisted on by a party who has agreed to do a particular thing on the happening of a certain event, with which he can make himself acquainted; that the rule is different where the matter in question is to be done at the option of the other party and lies particularly within his knowledge".¹⁷

If the event becomes impossible.—Where parties contemplated the

7 *S. I. Ry. v. Vashyam*, 1935 M 356.

8 *Joachimson v. Swiss Bank*, (1921) 3 KB 110, 115: (1921) All ER Rep 92.

9 *Leigh v. Lille*, 30 LJ Ex 25.

10 *Francis v. Bruce*, 44 Ch D 627; but see *Brooks v. Mitchell*, 11 LJ Ex 51.

11 *Bisweswar v. Jaidayal*, 49 CWN 368.

12 *Turner v. Burkinshaw*, LR 2 Ch 488.

13 *Walton v. Mascal*, 14 LJ Ex 54.

14 *Brown v. G. E. Ry.*, 2 QBD 406, 410.

15 *Waters v. Thanet*, 11 LJ QB 87, 91.

16 *Hongkong Fir Shipping Corporation v. K. K. Kaisha*, (1962) 2 WLR 474, 495 CA: (1962) 1 All ER 474.

17 *Vyse v. Wakefield*, 9 LJ Ex 274: (1835-40) All ER Rep 294. There is no obligation to give notice in case of marine insurance, *Potter v. Rankin*, LR 5 CP 341, 377.

continued existence of a thing as the foundation of what was to be done, the contract, in the absence of any express or implied warranty that the thing shall exist, is not to be considered a positive contract but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.¹⁸ The principle is applied also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance. It is sufficient if the condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case they will not be held bound by the general words which were not used with reference to a possibility of a particular event rendering performance of the contract impossible. Thus where rooms were hired for view of the coronation procession, the postponement of the procession made it impossible for the plaintiff to recover the balance of the rent.¹⁹ On a contract for the sale of 200 tons of potatoes out of a specified crop, performance was excused on the potatoes being destroyed by causes over which the seller had no control, it becoming impossible for him to perform the contract.²⁰ A sale of future goods being dependent on the goods coming into existence after lapse of time becomes void if the goods do not come into existence at all. Thus if a municipality sells the right to collect pig dung which becomes its property if the dung is not removed by the owner of the pig the sale becomes void if the owners invariably remove the dung from the streets as of right leaving nothing on the street.¹ A contract dependent on the will of a third person becomes impossible and, therefore, falls through if his consent cannot be procured.²

33. Enforcement of contracts contingent on an event not happening.—Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustrations

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

¹⁸ *Taylor v. Caldwell*, 3 B & S 826: 32 LJ QB 164.

¹⁹ *Krell v. Henry*, (1903) 2 KB 740: (1900-03) All ER 20, for a fuller treatment of the subject, see s. 56 note.

²⁰ *Howell v. Coupland*, 1 QBD 258: (1874-80) All ER Rep 878.

¹ *Markapur Municipality v. Dodda Ramiraddy*, AIR 1972 AP 299, 301.

² *Shardaprasad v. Sikandar*, 35 IC 461.

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.—If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

The section.—Performance of a condition precedent by a party is dispensed with if the other party refuses to abide by it, *e.g.*, to nominate an arbitrator.³ Where an insurance company contended that the assured had failed to perform the obligation resting on him with regard to the giving of notice and that the company was discharged from liability under the policy, by reason of the default, *held*, as the company had repudiated its liability there was no obligation to forward such notice.⁴ If a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of the condition precedent to the act which he has so rendered himself unable to perform.⁵ In the case of a breach of promise to marry a person, who is disabled by his own act by marriage with another from marrying the plaintiff, a request on the part of the plaintiff is dispensed with and he can at once maintain an action.⁶ "The party must show that he was ready; but if the other party stops him on the ground of an intention not to perform his part it is not necessary for the first to go further and do a nugatory act".⁷ Where on the construction of a contract the handing of a delivery telegram to the seller was a condition of the contract and the condition was not fulfilled by him, the buyer was entitled to treat the contract as broken and claim damages.⁸

35. When contracts become void which are contingent on happening of specified event within fixed time.—Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.—Contingent

³ *Thomas v. Fredricks*, 16 LJ QB 393.

⁴ *Re Coleman's Depositories*, (1907)2 KB 798, 803, 805: (1904-07) All ER 383; *Amara v. Chalavadi*, 157 IC 751.

⁵ *Sands v. Clarke*, 19 LJ CP 84.

⁶ *Short v. Stone*, 15 LJ QB 143.

⁷ *Jones v. Barkley*, 2 Doug 684, 694, cited in *British & Benningtons Ltd. v. N. W. Cacher Tea Co.*, 1923 AC 48, 65: (1922) All ER Rep 224.

⁸ *Haji Peer v. Sakavath*, 43 MLJ 199, 207.

contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

The section.—Where a deed contains a promise to repay the principal borrowed with interest by a certain day and it is provided that in case of failure to pay within the stipulated time the land shall be given up as if it is a sale, the courts have to construe whether the document is a mortgage by conditional sale or a sale. If it be construed to be a sale then it is subject to the condition that it is not enforceable if the loan be duly repaid; the sale in such a case becomes void under this section.⁹ Where the plaintiff has performed a part of the condition precedent and the defendant has received a substantial portion of it, it is no longer competent to the latter to rely upon the non-performance of the remaining part as a condition precedent to his liability. In other words, that which might have been a condition precedent, if the contract was executory, has ceased to be so by the defendant's subsequent conduct in accepting less than his bargain.¹⁰ Where A executed a surety bond for the payment of a decretal debt due by B and C, and bound himself to make B deposit the decretal amount, and in case of default by B undertook to pay the amount himself, B died before the specified date and the surety disputed his own liability to pay, *held*, the contract was enforceable, as the specified uncertain event was the payment of the decretal debt and that event did not happen before the specified time.¹¹

36. Agreements contingent on impossible events void.—Contingent agreements to do or not to do anything if an impossible event happens are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

⁹ *Asvath v. Chimabai*, 27 Bom LR 1246.

¹⁰ *Carter v. Scargill*, LR 10 QB 564.

¹¹ *Wadara v. Kin*, 8 IC 985.

CHAPTER IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be performed

37. Obligation of parties to contracts.—The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such of promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A*'s representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives or by *B*.

1. **The section.**—The section is not limited to cases where performance as a whole is excused or dispensed with. It covers cases of partial performance as well.¹ The question whether an agreement of sale made by several persons, some of whom did not sign it, is binding at least on those who signed it, depends on the intention of the parties that they wanted to leave the agreement incomplete and unenforceable against the executing parties. This intention is to be established by those who signed it by showing that they would not have executed the agreement if the persons not signing it had not joined.² Under the section representatives are bound by an agreement but not members of the same joint family with a deceased contractor.³ A court is not justified in ignoring the clear provisions of this section on the ground that the terms of the contract are harsh and unconscionable.⁴ A purchaser cannot be made to accept more than the quantity contracted for.⁵ A charterparty to load, 'say, about 2,800 tons' is satisfied by loading 2,840 tons.⁶ In case of a contract for sale of a specified quantity of goods 'more or less', the buyers cannot be made

1 *Bhayya v. Damodhar*, 1946 N. 336.

2 *S. Parvaty Ammal v. B. K. S. Chettiar*, AIR 1972 Mad 222, 227.

3 *Ramdulari v. Jang Bahadur*, 77 IC 378.

4 *Suryadevara v. Suryadevara*, 35 IC 111.

5 *Cross v. Elgin*, 2 B & Ad 106.

6 *Miller v. Borner & Co.*, (1900)1 KB 691; see *Re Harrison & Mioks*, (1917)1 KB 755; *Windle v. Barker*, 25 LJ QB 349.

to accept any greater or less quantity than the specified quantity.⁷ The maxim *actio personalis moritur cum persona* has no application to breaches of contracts, except those which constitute a personal wrong, and with that exception, all rights of action for breaches of contract pass to the executors.⁸ There is, so far as the liability of the contracting party goes, no difference between a contract to which A is a party in his capacity as a "trustee" and one to which A is a party in his personal capacity. In either case, the opposite party contracts with A and with no one else; and, in the absence of an express or clearly implied term of the contract itself in that behalf, no limitation is to be placed upon A's personal liability by virtue of his being in fact, and by his being described as, a trustee.⁹ A receiver is not personally liable under a pre-existing contract.¹⁰ Where a third party has knowledge of a breach of contract and with that knowledge is a party to it, privity of contract is established. The liability of a party to a contract is limited by the reservation of right in favour of a third party.¹¹ The section does not affect the operation of the rule of *damdupat* which comes under the terms 'any other law'.¹² Under an exemption clause from liability in a chain of contracts the last contractor is not liable to the first.¹³

2. Promises when bind the representatives.—The executors of a deceased shareholder are bound to pay in case a call is made on them;¹⁴ commissions earned by the deceased are payable to his executors.¹⁵ An agreement at the time of family partition giving liberty to a coparcener to buy the share of another if he should wish to sell it binds the representative of the promisor.¹⁶ An option of resale granted without any limit of time is void as being in contravention of the rule against perpetuity. Such a contract cannot be enforced against a personal representative of the contracting party.¹⁷ But the benefit of a personal contract does not pass to the legal representatives.¹⁸ Thus in cases of principal and agent or master and servant the death of either party puts an end to the relation, and, in respect of service after death, the contract is dissolved unless there be a stipulation to the contrary. It is obvious that if the servant dies the master cannot compel his representatives to perform the service in his stead or pay damages, and equally by the death of the master

7 *Reuter v. Sala*, 4 CPD 239; 48 LJ CP 492, see *Mc. Connell v. Murphy*, LR 5 PC 217.

8 *Formby v. Barker*, (1903)2 Ch. 539, 550; (1900-03) All ER Rep 445.

9 *Mahanth v. Aye*, 14 R 336.

10 *Dinshaw v. Amrit*, 10 Pat 379.

11 *Strathcona S. S. Co. v. Dominion Coal Co.*, 1926 AC 108, relied on in *National Talkies v. Imperial Talkies*, 164 IC 929; *Canadian T. Co. v. Court Line*, 1940 AC 934.

12 *Bapu v. Anant*, 1946 N 210.

13 *The Kite*, 1933 P 154.

14 *Wills v. Murray*, 19 LJ Ex 209; see s. 211, Succession Act.

15 *Wilson v. Harper*, (1908)2 Ch 370.

16 *Ratan v. Ramanuj*, 1944 N 187.

17 *Gopiram v. Jeot Ram*, 45 A 478.

18 *James v. Morgan*, (1909)1 KB 564.

the servant is discharged of his service, not in breach of the contract but by implied condition.¹⁹ Executors are responsible on all the contracts of the testator broken in his lifetime. There is, however, one well-known exception to their liability for contracts broken after his death, namely, in those cases where personal skill or taste is required.²⁰ An agreement to take delivery of certain goods is not a contract of a personal nature, therefore, it binds the executors on the death of the party.¹ Representatives may sue for all debts due to the deceased and all contracts with the testator broken in his life-time.² But no action for breach of promise of marriage can be brought by executors or will lie against them. The action is strictly personal although in form it is an action for a breach of contract, unless special damage be proved, *e.g.*, damage to property.³ In a suit for the recovery of damages for breach of a contract of betrothal the representatives of the plaintiff, on his death during the pendency of the proceedings, were held entitled to recover the expenses which the plaintiff had incurred while the betrothal was in existence but not damages.⁴ An agreement between co-sharers to divide profits in a particular manner is binding on the heirs.⁵

3. **The Assignment of contracts.**—The Act contains provisions relating to assignments but nowhere lays down what assignments are or are not good in law,⁶ except S. 62 which is confined to cases of novation, and S. 40 which shows what contracts a promisor is bound to perform personally and what he may perform by employing a competent person to carry them out. The rules as regards the assignability of contracts in this country is that the benefit of a contract for the purchase of goods, as distinguished from the liability thereunder, may be assigned, understanding by the term *benefit* the beneficial right or interest of a party under the contract and the right to sue for the recovery of the benefits created thereby. The rule is however subject to two qualifications: first, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil, and, next, that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it. The right to claim the benefit of the contract, or the right, on certain conditions, to call for delivery of the goods mentioned in the contract, constitutes “a beneficial interest in movable property” under S. 3 of the Transfer of Property Act and as such is assignable, but if the assignment be of such a nature that if permitted it would defeat the

19 *Farrow v. Wilson*, LR 4 CP 744.

20 *Siboni v. Kirkman*, 1 M & W 419; *Corner v. Shaw*, 3 M & W 350.

1 *Wentworth v. Cook*, 10 A & E 42.

2 *Raymond v. Fitch*, 2 Cr M & R 596.

3 *Finlay v. Chirney*, 20 QBD 494, suit will be for the amount of special damage only.

4 *Balubhai v. Nanabhai*, 44 B 446.

5 *Hasina v. Abdul*, 146 IC 554.

6 *Nochat v. Kalloor*, 63 IC 696.

provisions of the Insolvency Act, then under S. 6 of the Transfer of Property Act as also under S. 23 of this Act the assignment would be void.⁷

A right to claim damages of an unascertained amount, resulting from a breach of contract on the part of one of the parties to that contract, is not assignable, as it is a bare right to sue and not a debt⁸; but if any ascertained amount is found to be recoverable as the result of a breach of contract, it becomes a debt and to that extent the right to recover damages is assignable.⁹ An assignment of a right to sell goods is not an assignment of a right to sue for damage.¹⁰ The obligation on the agent's part to account to his principal cannot be assigned. An assignment of a debt to be valid must be of the whole debt.¹¹ Where credit was given to a party to a contract in the matter of payment and at the same time liabilities were thrown upon him, the discharge of which depended upon his solvency, and a certain discretion was vested in him in regard to the quantity of goods to be demanded and the contract was an executory or continuing one, the contract was based on personal considerations and its assignment was invalid without the promisor's consent and the assignee was not entitled to sue on it.¹² An agreement regarding the publication of a book between an author and a publisher is personal to the individuals entering into it. The benefit of such a contract is not capable of assignment.¹³ There cannot be an assignment of a copyright in a non-existing work.¹⁴ A contract to supply all the eggs of a specified quality that the other party shall require, the other party undertaking not to buy eggs from any other merchant, has been held to be a contract of a personal nature and therefore not assignable.¹⁵ An order on a banker to pay money which he holds to the credit of the customer is not an assignment of a debt, but an authority to deliver property, which, if acted on, is equivalent to delivery by the customer.¹⁶ An assignee of a debt suing the assignor cannot be defeated by a plea that the assignment was without consideration,¹⁷ but that principle has no application where the assignment is impeached on the ground of fraud or of being contrary to

7 *Jaffer v. Budge-Budge Jute Mills*, 33 C 702, approved in 34 C 289, see argument of Counsel. English rule is also to the same effect, *Tolhurst v. Associated Portland Cement Mfrs.*, (1902) 2 KB 660; (1900-03) All ER Rep 386; see *Jairam v. I. & I. Steel Co.*, 1940 C 466; Halsbury, 4th ed. vol. 9, para 337.

8 *Abu Mahomed v. Chunder*, 36 C 345; *Jangali v. Pioneer Flour Mills*, 27 IC 115. If the claim be founded on tort the claim is not assignable; *Varahaswami v. Rama*, 38 M 138; *Keval v. Fakira*, 13 B 42, assignment of mortgage bond not void; *Phirozshah v. Goolbai*, 50 IA 276; *Powri v. Shiwa*, 156 IC 487.

9 *Powri v. Shiwa*, 156 IC 487, as to meaning of debt see S. 25 note 11.

10 *Rangiah v. Partha*, 1947 M 258.

11 *Ghisulal v. Gambhiramal*, 62 C 510.

12 *Namasivaya v. Kadir*, 17 M 168, 174; *Toomey v. Ram*, 17 C 115, 121.

13 *Griffith v. Tower Publishing Co.*, (1897) 1 Ch 21; (1895-99) All ER Rep 323.

14 *Amar v. Madan*, 1939 L 433.

15 *Kemp v. Baerselmann*, (1906) 2 KB 604; but if the contract be not personal it is assignable, *Talhurst v. Associated Portland Cement Mfrs.*, 1903 AC 414; (1900-03) All ER Rep 386.

16 *Sethna v. Hemingway*, 38 B 618, 629.

17 *Gopal v. Gangaram*, 14 B 72, 76; *Manishankar v. Bai Muli*, 12 B 686.

the provisions of any Act or of being a sham transaction.¹⁸ Where the assignment by the creditor is not complete, because it is not registered, the suit against the debtor must be in the name of the assignor.¹⁹

An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned, except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable, unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.²⁰

In substance Sections 37 and 40 lay down that, subject to certain exceptions, a contract, in the absence of a contrary intention, express or implied, will be enforceable by and against the parties and their legal heirs and legal representatives including assignees and transferees.¹ The existence of an arbitration clause does not affect the assignability of the contract if it is otherwise assignable.²

38. Effect of refusal to accept offer of performance.—Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:—

- (1) it must be unconditional:
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do:
- (3) if the offer is an offer to deliver anything to the promisee the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

¹⁸ *Satu v. Dagdu*, 9 Bom LR 462.

¹⁹ *Skinner v. Bank of Upper India*, 57 A 314 PC.

²⁰ *Khardah Co. Ltd. v. Raymon & Co.*, AIR 1962 SC 1810, 1817.

¹ *Ram Baran v. Ram Mohit*, AIR 1967 SC 744.

² *Hindustan Steel Works Construction Ltd. v. Bharat Spun Pipe Co.*, AIR 1975 Cal 8, 11, 12.

Illustrations

A contracts to deliver to B at his warehouse, on the first March, 1878, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

1. **The section.**—The section deals with the question of an unaccepted offer and merely states that the same legal consequences will ensue on an offer made to one of several joint promisors as on an offer to all of them.³ It does not deal with the legal consequences of an offer which has been accepted. The section is not helpful in determining whether payment to one joint creditor is binding on others.⁴ The section should be construed independently of the English rules as to tender, unless there is an express obligation to tender. Under the section the offer of performance must fulfil certain conditions.⁵ A tender to be valid must comply with the requirements of the section. The amount need not be deposited in court.⁶ The operation of the section is confined to 'the promisee' and does extend to his heirs or assignees.⁷

Where in a case of a sale with an agreement for repurchase on or before certain specified date, the seller of property offers to repurchase it before that date but the purchaser denies that there was any agreement to reconvey, it amounts to a complete repudiation of the contract to reconvey. In cases of this kind no question of formal tender of the amount to be paid arises and the question to be decided is not whether any money was within the power of the seller but whether the purchaser definitely and unequivocally refused to carry out his part of the contract and intimated that money will be refused if tendered. The principle laid down in *Hunter v. Daniel*⁸ is applicable to cases of this kind. In that case Wigram V. C. stated the position as follows:—

"The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money."

Lord Buckmaster in *Venkatarayanim v. Zamindar of Tuni*^{8a} accepted this statement of the law.⁹

2. **Tender.**—The principle of the plea of tender is that the defendant has been always ready to perform in its entirety the contract on which the action is founded and that he did perform it, as far as he was able, by tendering the

³ *Satindra v. Jatindra*, 31 CWN 374.

⁴ *Mahadeo v. Balmukund*, 1948 N 279, *Gobindlal v. Firm Thakurdas*, AIR 1974 Bom 164.

⁵ *Ismail v. Adam*, (1938)2 Cal 337.

⁶ *Harnath v. Hriday*, 1947 P 208.

⁷ *Aluri v. Muttangi*, 1939 M 818.

⁸ (1845)4 Hare 420.

^{8a} AIR 1923 PC 28, 28; 50 IA 41, 47.

⁹ *International Contractors Ltd. v. Prasanta*, AIR 1962 SC 77.

requisite money, the plaintiff himself precluding a complete performance by refusing to receive it.¹⁰ If a tenant is able to prove that he has made a valid tender which has been improperly refused and also that he has kept it good, he is not in any worse position than he would be in if he had deposited the money in court.

A tender to a servant is good tender to the master.¹¹ A tender by an agent is good though the agent was authorised to tender a smaller sum.¹² A tender of goods of the contract quality and description imported by another firm is a good tender in fulfilment of the contract.¹³ In order to be able to make a valid tender it is not necessary to have physical possession of the goods.¹⁴ A tender is nonetheless valid even if made under a mistaken view of an arrangement pursuant to which it is made.¹⁵ In case of cross contracts for delivery of exactly similar quantities of the same goods there is no necessity for either party to tender the goods or the price, the difference only may be paid.¹⁶ Tender presupposes a person to whom one could tender. If the defendants are not to be found at their usual place of business it is not possible for the plaintiffs to make the tender. A tender will be dispensed with where the defendant has refused to perform the contract or on the day of performance of it he has absconded.¹⁷ An offer which would have been ineffective if made to the original promisee is also ineffective if made to the legal representatives or heirs of the deceased promisee after the death of the latter.¹⁸ A tender is to be made when the sum is due,¹⁹ not afterwards.²⁰ For further details as to time and place of tender, see Ss. 47-50. This section states where a promisor is not responsible for non-performance. Similar provision is also made in Ss. 51, 53 and 67.

The consequence of a tender is merely that a promisor is not responsible for non-performance. Interest will cease to run from the date of the tender.¹ As an ordinary rule nothing but actual tender will stop interest.² In the case of ordinary money claims, not based on mortgage, a tender before suit of the amount due, though improperly refused, does not stop the running of interest unless the debtor follows the tender by depositing the money into the court when the creditor sues for it.³

10 *Dixon v. Clark*, 16 LJ CP 237; *Cotton v. Godwin*, 10 LJ Ex 243; Halsbury, 4th ed. vol. 9, paras 520, 521, 523.

11 *Moffat v. Parsons*, 5 Taunt 307; 128 ER 707; *Finch v. Boning*, 4 CPD 143; *Kirton v. Birthwaite*, 56 LJ Ex. 165; 150 ER 451 (to a solicitor's lad in office).

12 *Read v. Goldring*, 2 M & S 86.

13 *Sazuki v. Uttamchand*, 50 B 318; 105 ER 314.

14 *Lakshmana v. Ramalinga*, 48 MLJ 522.

15 *Subramania v. Semalai*, 147 IC 1062.

16 *Karuppa v. Chotta*, 1945 M 59.

17 *Zippel v. Kapur*, 139 IC 114.

18 *Ismail v. Adam*, (1938)2 Cal 337.

19 *Richardson v. Harris*, 22 QBD (275).

20 *Dobie v. Larkan*, 10 Ex. 776.

1 *Ramaswamy v. Muniandy*, 5 IC 343; *Kamaya v. Devapa*, 22 B 440.

2 *Pandurang v. Dadaboy*, 26 B 643, disapproved in *Ismail v. Adam*, (1938)2 Cal 337.

3 *Arumachallam v. Govindaswami*, 55 M 458.

3. **Tender to be of the whole of what is due.**—A tender to be valid must be an unqualified offer to pay the amount due.⁴ A tender of more than what is due is, of course, good.⁵ A tender of a part of an entire debt is bad.⁶ A creditor is not bound to accept a less sum nor does such a tender stop the running of interest or the liability for costs of the suit.⁷ A creditor is under no obligation to reduce the costs of proceedings for the benefit of the debtor by accepting a tender of part payment.⁸ The rule applies where the claim is not made up of several separable items.⁹ The rule also applies to a tender for payment under a mortgage decree.¹⁰ There cannot be a tender or any agreement to waive a tender of an unascertained sum.¹¹ When the landlord has tendered that which the court has subsequently found to be the true amount due and owing in respect of improvements, if the tenant chooses to hold over after that date, he can do so only at his peril and on condition of paying the mesne profits on the land.¹² If the debtor tenders what is due but the creditor insists on having more, there is a good tender. If a debtor tenders more than he ought to pay it is good and the creditor ought to accept so much of it as is due to him.¹³ But a tender of a larger sum requiring change is not a good tender of a smaller sum.¹⁴ Objection to the form of a tender may be waived by the creditor. A creditor who denies tender is not entitled to question its sufficiency.¹⁵ The creditor cannot impose a condition that another account should also be satisfied.¹⁶ A debtor indebted in distinct sums may however make a tender of one of the sums.¹⁷ Under the Bombay Regulation 5 of 1827 S. 14, a debtor, including a mortgagor, may tender a part of the debt, but the interest does not cease to run until the entire debt is discharged.¹⁸

4. **Offer must be unconditional.**¹⁹—A tender accompanied by a condition which the debtor had no right to impose is not a good tender.²⁰ A tender should be unconditional. A promisee is under no obligation to accept a tender accompanied by a condition. Thus, a payment by cheque for two items, only one of

4 *Lal Batcha v. Arcot*, 34 M 320.

5 *Hiralal v. Khizar*, 161 IC 251.

6 *Dixon v. Clark*, 16 LJCP 237; 136 ER 919; *Abdul v. Ali*, 123 IC 58.

7 *Watson & Co. v. Dhonendra*, 3 C 6, 16; *Ram v. Gopala*, 1932 N 169.

8 *Ismail v. Adam*, (1938) 2 Cal 337.

9 *Chunder v. Jadoonath*, 3 C 468.

10 *Faghfur v. Khushal*, 74 IC 246.

11 *Lal Batcha v. Arcot*, 34 M 320.

12 *Chami v. Pattar*, 32 IC 861.

13 *Baikunth v. Benode*, 29 CLJ 256; *Dean v. James*, 4 B & Ad 546; 110 ER 561; *Krishna v. Binjani*, 1949 M 535.

14 *Robinson v. Cook*, 6 Taunt 336; *Black v. Smith*, Peake 121; *Cadman v. Lubbock*, 5 D & R 289; *Bevans v. Rees*, 8 LJ Ex. 263; 151 ER 130.

15 *Krishna v. Binjani*, 1949 M 535.

16 *Bevans v. Rees*, 8 LJ Ex. 263; 151 ER 130.

17 *Fyler v. Bland*, 11 LJ Ex. 257.

18 *Nadershaw v. Shirinbai*, 25 Bom LR 839.

19 *Halsbury's Laws*, 4th ed. vol. 9, para 526.

20 *Re Steam Stoker Co.*, LR 19 Eq 416; 44 LJ Ch 386.

which was due at the time, is not a good tender.¹ A tender of '£8 in settlement of the plaintiff's account' is unconditional.² A tender under protest, reserving to the debtor the right to dispute the amount due, without imposing any condition on the creditor, is good and is not a conditional tender.³ A person is not bound to accept a tender of railway receipts for goods subject to demurrage.⁴ A tender is valid if it implies merely that the party offers a given sum as being all that he admits to be due; but, if it implies also that if the other party takes the money he is required to admit that no more is due, the tender is conditional and insufficient.⁵ Where a debtor tendered the balance of the debt due and demanded a receipt in full, but the creditor refused to accept on the ground that it was insufficient, the tender was conditional and invalid.⁶ A tender by a person who has entered into a contract for the purchase of the equity of redemption is not valid if it is conditional upon the endorsement, cancellation and delivery of the mortgage deed.⁷ Where a mortgagor tendered the amount due to the mortgagee but the latter refused to hand over the documents of title and reconveyance, the tender was not conditional, the mortgagee by refusing to accept was held liable to pay the costs of the suit.⁸ A tender to a creditor or a deposit in court in respect of the creditor's claim before it has become due is not valid and does not preclude him from claiming interest.⁹ A tender is not vitiated because a receipt is asked.¹⁰

5. **Able and willing.**—An offer of performance must be such that the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound to deliver. A mere offer by registered post to deliver something, or rather, the expression by letter of a willingness or readiness to deliver, is not a proper tender.¹¹ A plea of tender before action must be accompanied by payment into court after action.¹² "Where the contract for the sale and purchase of Government paper provides for the delivery of paper on a subsequent date, it is not necessary in order to sustain an action against the buyer for non-acceptance on the due date that the plaintiff should have taken the Government paper contracted for to the place of the defendant and there made an actual tender of it." "If the plaintiff was ready and willing

1 *Hiralal v. Khizar*, 161 IC 251.

2 *Eckstein v. Reynolds*, 6 LJKB 198: 112 ER 401.

3 *Greenwood v. Sutcliffe*, (1892) 1 Ch. 1.

4 *Motichand v. Fulchand*, 26 C 142.

5 *Bowen v. Owen*, 11 QB 130, cited in *Haji Abdul v. Haji Noor*, 16 B 148; see *Sati v. Monmatha*, 18 CWN 84.

6 *Ford v. Noll*, 12 LJCP 2; *Amar v. Chandra*, 51 IC 793.

7 *Varadarajulu v. Dhanalakshmi*, 26 IC 184.

8 *Rourke v. Robinson*, (1911) 1 Ch 480; *Pandurang v. Dadabhoy*, 26 B 643.

9 *Eshahug v. Abdul*, 31 C 183.

10 *Richardson v. Jackson*, 8 M & W 298; 151 ER 1051, *referred to in Jagat v. Naba*, 34 C 305; *Amar v. Chandra*, 51 IC 793; *Finch v. Miller*, 5 CB 428: 186 ER 945.

11 *Sabapathy v. Vanmahalinga*, 38 M 959, 970; *Pandurang v. Dadabhoy*, 26 B 643; *Kamaya v. Devapa*, 22 B 440; see n 7 post.

12 *Haji Abdul v. Haji Noor*, 16 B 141, 149; *Behari v. Ram*, 24 A 461; *Sabapathy v. Vanmahalinga*, 38 M 959, 970; *per contra Gajendra v. Sitanath*, 90 IC 637.

to perform his part of the contract, that is to say, if he was in a position to transfer the security on the appointed day and did his best to inform the defendant by going to his place of business that he was so, that would be sufficient in the absence of evidence to the contrary to constitute readiness and willingness".¹³ An offer made by a promisor, through his solicitor, to pay a debt with interest due thereon at the date of the offer, does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing there and then to perform his promise.¹⁴ If a purchaser after taking delivery of a part gives notice that he will not accept or pay for the rest, the vendor can sue the purchaser for breach of the contract without tendering the rest of the goods. The repudiation of the contract by the defendant makes proof of readiness and willingness by the plaintiff immaterial.¹⁵ A party need not make a tender unless the other party was ready and willing to perform his part of the contract. This would appear from S. 51.¹⁶ In a suit for specific performance the strict law as to tender is not applicable.¹⁷

6. **Tender of instalments.**—In the absence of any stipulation between contracting parties as to the payment of the sum borrowed, the lender is entitled to decline to receive payment in instalments; he can claim that the whole sum due be paid at one and the same time.¹⁸ Where, however, a contract provides for delivery in instalments a tender of a reasonable part of an instalment is good.¹⁹ After default has once been made, when under the stipulation the whole money has become due, the subsequent instalments, even if they were tendered on due dates, were not properly tendered.²⁰

7. **Reasonable opportunity.**—The rule in this section agrees with the rule of English law, but there is little authority as to what is a reasonable opportunity of inspection. In respect of a contract for the purchase of 100 bales of cotton the court observed "that a period of over 24 hours gave a reasonable opportunity to see whether the cotton offered was the cotton which the plaintiffs were bound by their contract to deliver." A purchaser of goods is not entitled to go on inspecting until the expiration of the period for delivery.¹ The general rule is that where a thing is to be done on a certain day it may be done at any time before 12 o'clock at night, unless there be any particular usage, as in the case of presentment of bills of exchange.² "A sufficient tender of money is not made if it be locked up in a box, nor of goods if they are enclosed in cask, which the other party is not allowed to open".³ This promisor cannot reasonably

13 *Juggernath v. Ram*, 9 C 791, 797.

14 *Ismail v. Adam*, (1938) 2 Cal 337.

15 *Cort v. Ambergate Ry.*, 17 QB 127; *Dayabhai v. Maniklal*, 8 BHCACJ 123.

16 *Begraj v. Alisher*, 77 IC 897; *Shriram v. Madangopal*, 30 C 865 PC.

17 *Tribhovandas v. Balmukundas*, 24 Bom LR 434.

18 *Behari v. Ram*, 24 A 461.

19 *Simson v. Gora Chand*, 9 C 473; but see *Hardingham v. Allen*, 17 LJCP 198.

20 *Servai v. Naidu*, 31 IC 304; but see *Jackson v. R. M. C. Co.*, (1910) 2 KB (947).

1 *Euttonsey v. Jamnadas*, 6 B 692, 698.

2 *Startup v. Macdonald*, 6 M & G 593, see as to late tender. Tender made at 8-30 p.m. on last day of delivery was held good.

3 *Sabapathy v. Vanmahalinga*, 38 M 959, 970; *Isherwood v. Whitmore*, 11 M & W 347.

expect the promisee to attend at the promisor's residence or place of business for the purpose of satisfying himself that the promisor is both able and willing to carry into effect the offer which he has made.⁴ Under Clause 3 the promisor is under no obligation to prove the identity of the thing offered to the promisee's satisfaction, *e.g.*, by the production of the invoice or otherwise. It is the promisee's duty to take steps necessary to satisfy himself. The promisor has only to give him an opportunity for it. The goods need not be in the plaintiff's actual physical possession, it will be sufficient if they are under his control and he is ready and willing to deliver if the price be paid.⁵ According to custom dealers intending to give delivery are bound to have their samples drawn at such times on or before the due dates as to admit of a reasonable opportunity for analysis and weighment within due dates in order to ascertain the quality and amount of the goods tendered.⁶ The section only requires the seller to give the buyer a reasonable opportunity of examining the goods.⁷

8. **Tender by cheque.**—A tender by cheque will be a valid tender if the person to whom it is tendered is willing to receive payment by a cheque, but the creditor may refuse it and demand cash.⁸ In *Blumberg v. L. I. & R. S. Corporation*⁹ it was held that payment by cheque was not a good tender. A landlord is not bound to accept a cheque from a tenant in payment of rent, but if he or his agent accepts the cheque and cashes it and takes the money, the tender amounts to payment.¹⁰

9. **Legal tender.**—A tender of money to be valid must be made in the current coin of the realm. In this country under the Indian Coinage Act, 23 of 1873, Ss. 12-15, the Indian Paper Currency Act, 20 of 1882, S. 16, and the Indian Coinage and Paper Currency Act, 22 of 1899, Ss. 2, 3, a legal tender includes coins and currency notes. A tender by a cheque therefore is not a legal tender. It is well settled that where a tender is actually made, but in a currency different from that required by law, for instance, by a cheque on a banker, the objection to the form of the tender may be expressly or impliedly waived by the creditor, and he will be deemed to have waived the objection if he rejects the tender on the ground of insufficiency in amount or on some other ground without making objection to the legality of the tender in point of quality.¹¹ Where a mortgagee stated that the loan was of Rs. 450 in the Poona currency, the money actually paid to the mortgagor must, in the absence of evidence to the contrary, be presumed to have been in that currency.

⁴ *Ismail v. Adam*, (1938) 2 Cal 337.

⁵ *Arunachalam v. Krshna*, 49 MLJ 530.

⁶ *Motumal v. Ruttanji*, 24 IC 883, on app 32 IC 720.

⁷ *Oomerees Raiee v. Hardiman*, 42 IC 382.

⁸ *Venkatarama v. Gopala*, 52 M 322; *Keshav Mills v. Commissioner of I.T.*, 1950 B 166.

⁹ (1897) 1 Ch 171, *referred to in Gokalchand v. Nandram*, 43 CWN 87 PC.

¹⁰ *Boyle v. Moulard*, 4 C 572; *Re Steam Stoker*, LR 19 Eq 416; 44 LJ Ch 386.

¹¹ *Jagat v. Naba*, 84 C 305; *Hiralal v. Khizar*, 161 IC 251; *Pymont v. Schott*, 1939 AC 145 (form of payment in foreign unit) referred to in *Marrache v. Ashton*, 1948 AC 311.

The mortgagee was entitled to be repaid in that currency or in its equivalent in British currency.¹² The despatch of a post office order, in which the plaintiff was wrongly described, is not a good tender. Plaintiff's keeping it is not equivalent to a waiver of the mistake.¹³

10. Offer to one of several joint promisees.—An "offer to one of several promisees" does not amount to a discharge; a tender to one of several such promisees does not override the provisions of S. 45.¹⁴ An offer of performance is not a discharge of an obligation. It is impossible to apply in this country the rule in *Wallace v. Kelsall*,¹⁵ as to the discharge of joint rights by performance to one of the joint obligees. It is only a payment made to one of the joint promisees that can give a discharge to the promisor, but where the promisor undertakes to pay the amount at some future date it is not equivalent to a discharge.¹⁶

The rule that a payment to one mortgagee will not operate as a discharge to the others has no application where the payment is to a joint mortgagee who is also the manager and agent of the others,¹⁷ or where the mortgagees are members of the same joint family,¹⁸ or where the payment to several co-creditors is collusive and fraudulent. Payment to a member of a joint family other than the *Karta* is not a valid discharge of a debt payable to a Hindu joint family.¹⁹ A payment made by a debtor to one of two joint creditors, between whom it has been agreed that the other shall receive the sum, cannot, when made with notice of the agreement and in defiance of it, be treated as a valid payment in discharge of the debt.²⁰ See in this connection S. 45.

In the case of joint promisees it was held, following the English law, in the case of *Barber v. Ramana*,¹ that a release by one of them without the knowledge or concurrence of the others will bind the latter. The authority of this decision, so far as the application of the principle to the case of co-mortgagees is concerned, is considerably shaken by the decision of the Court of Chancery in *Powell v. Broadhurst*.² Payment fraudulently made to one of the creditors and not for the benefit of them all cannot operate as payment to them all.³ It has been pointed out that when a claim is on a money bond to two or more obligees, the presumption in equity is that the obligees are tenants in common and not joint tenants with the consequence that the

12 *Trimbak v. Shakharam*, 16 B 599.

13 *Gordon v. Strange*, 1 Ex. 477.

14 *Govindlal v. Firm Thakurdas*, AIR 1974 Bom 164, 170-171.

15 10 LJ Ex. 12.

16 *Ramasami v. Katayya*, 47 MLJ 840; see *post*.

17 *Gulzar v. Trailakha*, 105 IC 751; *Anakalamma v. Chenchayya*, 41 M 637.

18 *Basantrao v. Narayan*, 78 IC 127; *Adaikkalam v. Marimuthu*, 22 M 326.

19 *Jiwan v. Sahu*, 1945 A 299; *Dau v. Sensmal*, 1951 Ajmer 11.

20 *Chinnaramanuja v. Padmanbha*, 19 M 471.

1 20 M 461, fold in *Kari v. Jatti*, 1 IC 219; *Subraya v. Valayuda*, 30 M 153; but see *Ramasamy v. Muniandy*, 20 MLJ 709; *Veeraswamy v. Ibramsa*, 19 MLJ 221; *Hossinara v. Rahmanessa*, 38 C 342.

2 (1901) 2 Ch 160.

3 *Beikunt v. Hara Lal*, 13 CLJ 234; *Veeraswamy v. Ibramsa*, 19 MLJ 221; *Sheikh Ibrahim v. Rama*, 35 M 684.

discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt.⁴ In the absence of proof of an agreement between two co-lessors that the rent paid should be held by them jointly or of a mutual grant of authority between them to receive the rent, the tenant by payment of rent to one of the co-lessors is not discharged from his liability to pay one half of rent to the other.⁵ The question "whether one of the three payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other two payees" was referred to Full Bench and it was held that he could.⁶ But this view has not been adopted by other High Courts and it has been held that the discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt.⁷ Payment to one of several joint promisees cannot in this country discharge the promisor so as to deprive the other promisees of their share of the debt. S. 45 of this Act and Ss. 13(2), 78 and 80 of the Negotiable Instruments Act indicate that joint promisees are tenants in common and not joint tenants of the debt. Under the English common law a joint promisee of a promissory note can effectually discharge the maker from liability so as to bar a claim against him by the other joint promisees.⁸ According to equity joint creditors must *prima facie* be regarded as tenants in common and not as joint tenants.⁹ As the result of the fusion of law and equity joint creditors are treated as tenants in common. Ss. 42, 43 and 44 embody exceptions to the common law, S. 45 is consistent only with joint promisees being regarded as tenants in common.¹⁰

S. 45 declares that joint promisees shall be treated as tenants in common and not as joint tenants of their interest. This section professes to deal with an offer of performance only and regulates the position of the parties to the contract in the event of the refusal by a promisee of an unobjectionable tender. It provides that in such a case the results are that (1) the promisor is not responsible for the non-performance; and (2) he does not lose his rights under

4 *Hossainara v. Rahmannessa*, 38 C 342.

5 *Ananda Prakash Dey v. Lokendranath Maulik*, AIR 1972 Or 269.

6 *Annapurnamma v. Akkayya*, 36 M 544 FB; see also *Daulat Ram v. Sayad Abdul*, 60 PR 1898; *Kari v. Jatti*, 1 IC 219; see *Ponnusamy v. Thyagaraja*, 32 IC 173; *Maung Nyan v. Po*, 44 IC 627; *Gulmيران v. Abdul*, 73 IC 682; *Parbhu v. Raghuber*, 42 IC 408; *Manzur v. Mahmudunnissa*, 25 A 155; per contra *Ram Chandra v. Goswami*, 32 A 164; *Barber v. Ramana*, 20 M 461, doubted in *Sitaram v. Shridhar*, 27 B 292, in *Ahinsa Bibi v. Abdul*, 25 M 26; in *Shekh Ibrahim v. Rama*, 35 M 685 and absolutely disapproved in *Jagat Tarini v. Naba Gopal*, 34 C 305, in *Hossainara v. Rahamannessa*, 38 C 342; and in *Ramjit v. Khemchand*, 23 IC 8.

7 *Hossainara v. Rahamannessa*, 38 C 342; *Hakim v. Adwaita*, 49 IC 63; *Ram v. Goswami*, 32 A 164; see *Sukhlal v. Kanjman*, 28 ALJ 290; *Banamali v. Talua*, 55 IC 841; *U. Po. v. Latchmanan*, 170 IC 95; *Shyam v. Jagannath*, 1937 A 527; *Satindra v. Jatindra*, 31 CWN 374; *Mathra v. Nizam*, 68 PR 1917 FB; *Manzur v. Mahmudunnissa*, 25 A 155; *Syed Abbas v. Misri*, 5 PLJ 376; per contra *Parbhu v. Jhalo*, 2 Pat LJ 520.

8 *Wallace v. Kelsall*, 7 M & W 264, not modified by *Powell v. Broadhurst*, (1901) 2 Ch 161; see *Parbhu v. Raghubir*, 42 IC 408.

9 *Steele v. Steele*, 22 QBD 537: (1886-90) All ER Rep 1021.

10 *U. Po. v. Lutchmanan*, (1937) 1 R 1.

the contract. But the section nowhere provides for the case of an accepted tender, it has no application in such a case. A payment, therefore, of the mortgage money to one of several co-mortgagees without the consent of the others is not a complete discharge of the mortgage debt.¹¹ The section in fact deals only with the case of an offer which has been rejected and not accepted.¹²

The co-heir of a single promisee is not entitled to give a discharge in respect of a bond executed to his ancestor, because as between the co-heirs the devolution is several. Co-heirs are not joint promisees but heirs of a single promisee. Payment, therefore, to one of the co-heirs of a promisee would not discharge the promisor from his liability to pay under the bond.¹³

39. Effect of refusal of party to perform promise wholly.—When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct his acquiescence in its continuance.

Illustrations

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

1. The section.—The section only means to enact what was the law in England, and the law here also before the Act was passed, namely, that where a party to a contract refuses altogether to perform or is disabled from performing his part of the contract the other side has a right to put an end to it. The rule will be found explained in the note to *Cutter v. Powell*.¹⁴ Illustration (a) is not a happy one. The singer by wilfully absenting herself, though on one night only, did, in fact, refuse altogether to perform an integral and essential part of her contract. By doing so she put it out of her power to perform her contract in its entirety.¹⁵ The section applies to executory and

11 *Mathra v. Nizam*, 41 IC 921 FB.

12 *Mathra v. Nizam*, 41 IC 921 FB; but see *Gulmiran v. Abdul*, 73 IC 682.

13 *Anakalamma v. Chenchayya*, 34 MLJ 315; *Muniandi v. Ramasami*, 29 IC 586; *Sitaram v. Shridhar*, 27 B 292; *Surju v. Khwahish*, 4 A 512; *Ahinsa Bibi v. Abdul*, 25 M 26; *Rudra v. Jangi*, 30 IC 371.

14 2 Sp. LC 1, 12, 7 Ed; see *Freeth v. Burr*, LR 9 CP 208; (1874-80) All ER Rep 751.

15 *Sootan Chand v. Schiller*, 4 C 252.

not executed contracts.¹⁶ It applies to all such breaches of contract which occur before the expiry of the last date on which the contract can be performed in whole or in part. It also covers and includes all earlier breaches, i.e., anticipatory breaches.¹⁷ The section does not apply to a case where it is not sufficiently shown that the promisee has put an end to the contract.¹⁸ The case of reciprocal promises is dealt with in S. 54. The section has also no application to the case of a mortgage in which an interest in the property passes, therefore a defendant cannot rescind a contract of mortgage because a plaintiff has failed to pay the full amount of consideration money. The subsequent conduct of a promisor is sometimes a ground for the rescission of a contract; but it is settled law¹⁹ that the failure to perform a promise which formed the whole or part of the consideration inducing an executed conveyance gives no right of rescission.²⁰ The right to rescind a contract is expressly conferred by the Act. A liability to make restitution (see S. 64) attaches to the party putting an end to a contract.¹

A contract may be broken quite as much by repudiation of liability under it as by making it impossible to fulfil the terms of the contract.² "A repudiation has been defined in different terms; by Lord Selborne, as an absolute refusal to perform a contract; by Lord Esher, as a total refusal to perform it; by Brown L. J., as a declaration of an intention to treat the obligation as altogether at an end. They all come to the same thing, and they amount at any rate to this that it must be shown that the party to the contract made quite plain his own intention not to perform the contract".³ The rescission of a contract in its ordinary sense means that the parties are relegated to their original position in which they were before the contract was made. That cannot be where a part of the contract has been performed. Rescission in the latter case means that an act occurs which determines the contractual relationship of the parties. That determination can only therefore be regarded as the wrongful repudiation of the contract by one party, accepted by the other and operating as the determination of the contract from that time.⁴ The fact that a party to a contract may, under the section, when the other has refused to perform it, put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril; he may, if prefers it, sue to recover

16 *Sultan v. Maksad*, 1944 P. 3.

17 *Phul Chand v. Jugal*, 8 Lah 501.

18 *Sahu v. Kandhaia*, 14 IC 129.

19 *Brownlie v. Campbell*, 5 AC 925.

20 *Makhan v. Hanuman*, 38 IC 877.

This view has been taken by the All HC *Rashik v. Ram*, 34 A 273; Bom. HC *Bhagabai v. Narayan*, 31 B 552; *Motichand v. Sagun*, 29 B 46 (Cal. HC), *Rajani v. Gaur*, 35 C 1051; but not by the Mad. HC., *Subba v. Debu*, 18 M 126; *Tirumal v. Pandla*, 35 M 114; or the Punjab Chief Court *Karm v. Basant*, 11 IC 321.

1 *Murali v. I. Film. Co.*, 1943 PC 34.

2 *Daswant v. Syed Shah*, 6 CLJ 398.

3 *Spettabile Navigazione v. Northumberland Ship Building Co.*, 121 LT 628, cited in *Master v. Garret*, 131 IC 220.

4 *Boston Deep Sea Fishing Co. v. Ansell*, 89 Ch D 339, 365: (1886-90) All ER Rep 65; *Mussen v. Van Diemen's Land*, 1988 Ch 253.

any debt due to him which has arisen from his execution of his part of the contract.⁵ "Rescission is a volitional act of the party who is not guilty of breach of the contract taking advantage of a breach that is complete on the part of the other party to the contract to exercise the right which the law gives him of terminating the contract. So as soon as one party to a contract indicates that he will not perform it, the other party has right, if he chooses, to say very well, the contract is at end".⁶ Where by the conduct of the promisee the promisors are prevented from carrying out their part of the promise, the promisee cannot complain of breach of agreement by the promisors.⁷ Where directors originally wrongfully gave a notice that they were going to close the mills and this was followed by a strike of the labourers, the directors under the rules were entitled to close the mills, so that the labourers could not claim damages under this section.⁸ The right to rescind a contract may be reserved to a party by the contract itself.⁹ But a party will not be allowed to avail himself of his own wrong to defeat the contract.¹⁰

2. In its entirety.—An implied repudiation of the whole contract is not ordinarily to be inferred from the refusal of part performance of a contract. Thus a failure to take delivery of 7 bales has been held not to entitle the plaintiff to treat the whole of the remaining contract as cancelled.¹¹ But where an agreement between a zeminder and a tenant was that the tenant should have a specified area for the purpose of a grove and the tenant does not either use a definite ascertainable portion for the purpose or uses a definite portion for some other purpose, he commits a breach of his contract, the zeminder is entitled to put an end to the contract unless he has acquiesced in the breach.¹² It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. The real matter for consideration in deciding whether one party is set free by the action of the other is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse the performance of the contract. In a contract for the sale of goods if the buyer clearly shows his intention not to be bound by and to repudiate the contract it amounts to a breach of the contract. If the plaintiffs do not accept the repudiation of the other party, they are not absolved from performing their part of the contract, at any rate from making a tender.¹³ In *General Bill Posting Co. v. Atkinson*,¹⁴ it was held that the Court was right in inferring

5 *P. R. & Co. v. Bhagwandas*, 34 B 192.

6 *Re Atkinson's Contract*, (1912)2 Ch 1, 12.

7 *Chettyar v. A. K. Firm*, 1989 R 84.

8 *Bakaralli v. Sassoon Mills*, 58 B 262.

9 *Whitbread v. Watts*, (1902)1 Ch 835.

10 *Municipal Council v. Krishnam*, 148 IC 170, the word 'void' should be read as 'voidable'.

11 *Obla v. Venkata*, 91 IC 580.

12 *Raghunath v. Muhammad*, 106 IC 268.

13 *Steel Bros. v. Dayal*, 47 B 924; see *Mahadev v. Gouri*, 1950 Ori 42.

14 1909 AC 118; see *Hari v. Beni*, 1937 ALJ 823.

from the conduct of the appellants that the respondent was justified in rescinding the contract and treating himself as absolved from further performance of it on his part. But a stipulation by a singer to be in London without fail 6 days before the commencement of his engagement for the purpose of rehearsals did not go to the root of the matter, so as to amount to a condition precedent. Whether a matter is a condition precedent or not does not depend on its importance but is to be determined by the intention expressed by the parties.¹⁵ A contract for the sale of property may be entire,¹⁶ or divisible.¹⁷ If it be entire, the failure of a seller to make out a good title to a part of the property may be a sufficient reason to put an end to the whole contract;¹⁸ so also if goods delivered be different from those contracted to be bought.¹⁹ A clause in a bill of lading provides that if the consignee be not ready to receive the goods the shipowner will be entitled to place them on the wharf. The consignee arrived after a part had been so landed, *held*, the contract was divisible and unless the shipowner was prejudiced, he was bound to deliver the remainder to the consignee.²⁰

Where the substance of an agreement is that goods should be paid for on delivery so that the defendant does not contemplate giving credit, then, if the plaintiff says that he will not pay on delivery, the defendant is not obliged to go on supplying him.¹ A failure to take delivery of one instalment of goods,² or to pay for one instalment of goods,³ does not amount to a refusal to perform the contract and therefore does not justify rescission. In *Volkart Bros. v. Rutnavelu*,⁴ the defendant was held justified in rescinding the contract on failure of the plaintiffs to deliver goods in monthly instalments as stipulated. But failure to pay for one instalment may entitle the seller to repudiate the contract if the conduct of the buyer afford reasonable ground for believing that he would be unable to pay for the future instalments and that he had determined to abandon the contract.⁵ A contract to deliver 200 tons of manganese ore "within 2 years from date in about equal monthly quantities" imports that the delivery of the entire quantity is to be made within 2 years; the words referring to monthly deliveries are nothing more than a statement of the times of the delivery within those 2 years which, if possible, would be most convenient to both parties, so that there is no breach of contract in case of non-delivery

15 *Bettini v. Gye*, 1 QBD 183: (1874-80) All ER Rep 242.

16 *Price v. Griffith*, 1 DGM & G 80; *Lumley v. Ravenscroft*, (1951) 1 QB 685; *Crosse v. Lawrence*, 9 Ha 462.

17 *Johnson v. Johnson*, 3 Bos & P 162; *Mestaer v. Gillespie*, 11 Ves 621: (1803-13) All ER Rep 594.

18 *Poole v. Shergold*, 1 Cox Eq 273.

19 *L. & P. Timber Co. v. N. S. Co.*, (1939) 2 KB 343.

20 *Wilson v. L. I. S. N. Co.*, LRICP 61.

1 *Withers v. Reynolds*, 2 B & Ad 882.

2 *Rash Behari v. Nrittya*, 33 C 477.

3 *Burn & Co. v. Lukhdirjee*, 28 CWN 104, *refing. to Simson v. Virayya*, 9 M 359; *Cooverji v. Rajendra*, 36 C 617, *Sundar v. Krishna Mills*, 23 IC 91.

4 18 M 63; *see Withers v. Reynolds*, 2 B & Ad 882.

5 *Bloomer v. Bernstein*, LR 9 CP 588; *see Swami v. Nukala*, 69 IC 41.

of the goods till the expiry of the 2 years.⁶ When a landowner sold to contractors the right of cutting 5 lakhs of sleepers and the contractors undertook to cut 15,000 sleepers each month, but they cut 1055 sleepers only in the first month and 3432 in the second, the failure of the contractors constituted a breach going to the root of the contract which entitled the landowner to determine it.⁷ In *Taylor v. Oakes*,⁸ it was held that a buyer could justify his refusal of an offer to deliver goods under a contract of sale by proving that if he had not refused, the goods when delivered would not have been in accordance with the contract. Failure by the plaintiffs to pay for goods which had at first been delivered on credit is not a renunciation of the contract or such a refusal as would excuse performance of the contract by the other party.⁹

It is well established that it is not every breach, but breach of an essential term alone, by one party that entitles the other to repudiate the contract, the breach of non-essential terms entitles the other to recover damages only.¹⁰ Where a contract is a severable one, non-performance by one party of his promise in respect of one portion of the contract will not excuse the other of his liabilities under another portion of the contract.¹¹ Where a purchaser took 1 bale out of 25 and defaulted in taking another lot of 4 bales, the vendor was entitled to consider the contract as at an end.¹² Where the author of a book gives the publisher only the right to publish and sell without parting with the copyright, the right to rendition of account of the sales on which royalties are payable exist in the very nature of things. The non-rendition of yearly accounts of royalties and the non-payment of royalties which accrues due on sales, are breaches of a fundamental obligation as regards payment of royalty created by the contract, which entitles the author to treat the contract as discharged by breach.¹³ Where the defendant called attention to a serious defect in the plaintiff's title, but the plaintiff insisted that he had made out a good marketable title, the defendant was entitled to treat this breach as a repudiation of the contract and to treat the contract as an end.¹⁴ If there is a substantial performance of a contract it cannot be put an end to for a trivial default. If a party accepts the benefit of a contract he waives his right to repudiate it.¹⁵ A person who justifies an alleged breach of contract upon one ground only, which is found insufficient, is not for that reason disentitled to rely upon other grounds which his rights under the contract entitle him to rely upon.¹⁶ The repudiation in some cases may be such as to entitle a party to

6 *Mohan v. Bisheshwar*, 70 IC 344.

7 *Homeshwar v. Jugal*, 43 CLJ 8 PC.

8 127 LT 267, foling *Braithwaite v. Foreign Hardwood Co.*, (1905)2 KB 543: 74 LJ KB 688, refd. to in *Nannier v. Rayulu*, 93 IC 673.

9 *Sundar v. Krishna Mills*, 23 IC 91, 96.

10 *Manokji v. Maniklal*, 76 IC 90; *Schuler A. G. v. Wilkman Ltd.*, (1973)2 All ER 39 HL.

11 *Narayanaswami v. Madras Ry. Co.*, 13 MLJ 488; *Swami v. Nukala*, 69 IC 41.

12 *Kumaraswami v. Arunachalam*, 52 MLJ 84

13 *Mishra Bandhu Karyalaya v. S. Koshal*, AIR 1970 MP 261, 278.

14 *Lakhmidas v. Sir Dorab*, 29 Bom LR 19.

15 *White v. Beeton*, 7 H & N 42, 49.

16 *Motichand v. Fulchand*, 26 C 142.

treat the contract as at an end.¹⁷ Thus where out of a total consideration of Rs. 599 the mortgagee failed to pay more than Rs. 50 to a prior encumbrancer, as he had contracted to do, the mortgagor was entitled to bring a suit for redemption before the specified period.¹⁸ Where there is a substantial deficiency in the area of property sold at a Registrar's sale, the court will rescind the sale and not enforce specific performance against the purchaser.¹⁹ Where A having failed to take delivery under a contract, B claimed to rescind it and another contract as well, there being no renunciation by A amounting to an absolute refusal to perform the contract, B was not entitled to rescind the second contract. The views of English judges serve as useful guides in determining what amounts to a refusal.²⁰

A contract to deliver a cargo of wood of certain lengths is not performed by loading other timber in the vessel and measuring and setting apart timber answering to the buyer's order, for a cargo and a parcel of cargo are different in terms and may be different in substance.¹ Goods cannot be said to correspond to the contract description when adulterated with foreign substance (to the extent of 35 p.c.) and a seller is not justified in delivering such goods not even if there be a stipulation in the contract to take the goods with all faults and defects. The buyer may reject the goods. So far as goods have been delivered and resold, the buyer is entitled to recover damages and he is not bound to take delivery of the part undelivered. A stipulation that each delivery is to be treated as a separate contract does not prevent the buyer from treating a breach of contract by the seller as a repudiation of the entire contract.² Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels within a specified time "by steamer or steamers," the purchaser is bound to accept the part of the goods which is shipped in time, though the other part may have arrived too late.³ The breach of one stipulation in a contract does not of itself amount to an entire repudiation of the contract. Whatever doubt as to this may have arisen from a comparison from such cases as *Withers v. Reynolds*⁴; *Hoare v. Rennie*⁵ has been set at rest by *Mersey Steel & Iron Co. v. Naylor*.⁶ The question was fully considered by the House of Lords in the latter case. The law is now clear that the breach of one stipulation does not necessarily carry with it even an implication of an intention to repudiate the whole contract or to an inference that similar breaches will be committed in relation to subsequent deliveries. It may do so if the circumstances lead to such an inference; but the further the parties have proceeded

17 *Ramdeo v. Cassim*, 21 C 173.

18 *Chhotku v. Baldeo*, 34 A 659, per contra *Deonarain v. Bhola*, 28 ALJ 1163.

19 *Bank of Bengal v. Akhoy*, 6 CWN 365.

20 *Rash Behary v. Nrittya*, 33 C 477.

1 *Kreuger v. Blanck*, LR 5 Ex 179; but see *Paul v. Pim*, (1922)2 KB 360.

2 *Munro v. Meyer*, (1930)2 KB 312; (1930) All ER Rep 241.

3 *Brandt v. Lawrence*, 1 QBD 344.

4 2 B & Ad 882.

5 5 H & N 19; *Honck v. Muller*, 7 QBD 92; *Simpson v. Crippin*, LR 8 QB 14.

6 9 AC 434; see *Maple Flock Co. v. Universal Products*, (1934)1 KB 148; (1933) All ER Rep 15.

in the performance of the contract the less likely is it that by the breach of one stipulation by one party he should intend to declare his incapacity to perform the contract or his intention not to carry it out. There must be an absolute and unqualified repudiation of a contract in order that the person repudiating may be sued immediately for the breach of the contract.⁷ The tests to be applied in such a case are (1) the quantitative ratio which the breach bears to the contract as a whole, and (2) the degree of probability that such a breach will be repeated.⁸ There may be clear acceptance of the repudiation of a contract in spite of the *locus penitentiae* given for its performance within a short time. Repudiation of a contract by the defendants amounts to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract. In case of repudiation by way of anticipatory breach, the contract is at an end if the repudiation is accepted, thereafter the buyer cannot justify refusal of an offer to deliver goods under the contract by proving that if he had not refused, the goods, when delivered, would not have been in accordance with the contract.⁹ A buyer who rejects goods on a wrong ground is not thereby precluded from relying on a valid ground which in fact exists.¹⁰ When defendants refuse to accept the goods delivered two courses are open to the plaintiff, either to treat the defendants' conduct as tantamount to a wrongful putting an end to the contract and sue them for the breach or to continue the contract. If the contract is kept alive it is done for the benefit of both parties.¹¹ If a buyer without any justification cancel his contract, he disables himself from setting up any defence which he might otherwise have done to an action for damages.¹² When a party bound by a contract is entitled to cancel it by reason of the breach by the other, notice of cancellation should be given to the other party. If no notice be given then it must be deemed that the breach was condoned and that the contract was allowed to continue.¹³ In case of an anticipatory breach of contract by an unqualified and positive refusal to perform the contract, though its performance is not yet due, the injured party may bring his action at once for recovery of damage.¹⁴

If one party to a contract repudiate it, the promisee may treat the repudiation as inoperative and at the end of the period of the contract treat the other party as responsible for all the consequences of non-performance, thereby keeping the contract alive; or, on the other hand, he may treat the repudiation

7 *Cornwall v. Henson*, (1900) 2 Ch 298, 303; *Workman v. Brazilleno*, (1908) 1 KB 968; *Millars' Karri v. Weddel*, 14 Com Cas 25, 29.

8 *Maple Flock Co. v. U. F. Products*, (1934) 1 KB 148; (1933) All ER Rep 15.

9 *Nannier v. Rayalu*, 49 M 781; *Braithwaite's Case*, (1905) 2 KB 543, condoned in *British & Bennington's Ltd. v. N. W. Cachar Tea Co.*, 1923 AC 48; (1922) All ER Rep 224.

10 *Taylor v. Oakes*, 38 TLR 349, 517, reld. to in *Steel Bros v. Dayal*, 47 B 924.

11 *Frost v. Knight*, LR 7 Ex 111; (1861-73) All ER Rep 224, relied on in *Janoo v. Heap*, 46 IC 497.

12 *Eustamji v. Hussein*, 23 Bom LR 1165.

13 *Kailasananda v. President District Board, Tanjore*, 106 IC 815.

14 *Manindra v. Aswini*, 48 C 427.

as a wrongful putting an end to the contract and may at once bring his action as on a breach of it.¹⁵ Where *B*, by his agent, contracted to carry goods for *A* by his ship, but before the date of shipment *B* wrote to *A* denying the authority of his agent to make the contract, on refusal to perform the contract before the time for performance arrived, the shipper had a right to treat the denial as a breach and he might sue *B* for the damage caused by such breach.¹⁶ Sale of a ship in repudiation of a charterparty agreement amounts to breach of contract.¹⁷ Where some of the goods to be delivered under an instrument are mixed up with others which are defective, the buyer is entitled to reject the whole instalment. The seller then may deliver the goods which are good as a fresh instalment or may replace the defective ones. If the buyers does not state that he is rejecting the instalment because some of the goods delivered are bad, but prefers to repudiate the whole contract when time has expired and there is no further question of replacement, the buyer cannot for the first time complain that the goods are defective. If the seller do not accept the repudiation of the contract as regards the remaining instalment he keeps the contract alive for the benefit of both parties and preserves the mutual obligations of the parties in tact.¹⁸ A party to an executory contract has no right before the time for performance arrives to demand of the other whether he would fulfil the contract.¹⁹

3. Disabled from performance.—A contract of service for a fixed period between an individual and an insurance company was held to be broken so far as the promise to pay a fixed salary was concerned, but the employee was not entitled to recover the loss of his commission on the company going into liquidation before the expiry of the said period,²⁰ for there was no implied obligation that the business, whether profitable or not, should be carried on for the benefit of the agent and the commission that he might receive.¹ If a lessee having agreed to discharge a debt of the lessor charged on the demised land fails to pay the debt the lessor cannot recover possession, because sec. 39 does not authorize a party to a contract who has completely performed his part of the contract to cancel it for failure of performance on the other side.² On the same ground it has been held that the mortgagor is not entitled to rescind

15 *Narasimha v. Potti*, 49 MLJ 720; *Frost v. Knight*, LR 7 Ex 111: (1861-73) All ER Rep 221; *Guy-Pell v. Foster*, (1930) All ER Rep 790: (1930) 2 Ch 169; *Johnstone v. Milling*, 16 QBD 460; *Smith v. Butler*, (1900) 1 QB 694.

16 *Danube & Black Sea Ry. v. Xenos*, 31 LJ CP 284.

17 *O. E. v. Sutherland*, (1919) 1 KB 618.

18 *Ramier v. Ramudu*, 56 M 304.

19 *Ripley v. McClure*, 18 LJ Ex 419, 425.

20 *Re English & Scottish Marine Insurance Co.*, LR 5 Ch 737; *Cowasjee v. Lalbhoy*, 8 IA 200.

1 *Rhodes v. Forwood*, 1 AC 256, 272: (1874-80) All ER Rep 476; see *Reigate v. Union Mfg. Co.*, (1918) 1 KB 592: (1918-19) All ER Rep 143; *Fowler v. Commercial Timber Co.*, (1930) 2 KB 1: (1930) All ER Rep 224; *Ranganath v. I. U. Assee.*, 1946 M 20.

2 *Kandasami v. Ramasami*, 42 M 203; see *Govindammal v. Gopalachariar*, 16 MLJ 524.

a mortgage after its execution and registration on the ground that he has not received the full amount of consideration money.³ The contrary view⁴ ignores what has been called "the radical distinction between a perfected conveyance and a contract".⁵ Where in a mortgage bond two considerations were stated only one of which was held to have been received by the mortgagor, the court granted a decree only for the amount received.⁶ Where a vessel chartered for carrying cargo was lost close to the port of discharge and a substantial part of the cargo was there delivered, there was performance of the contract.⁷ A contract is broken if a party by his own act places himself in a condition which prevents him from performing the contract when he may be called upon to do so at any time during a certain period.⁸ But a contract to reconvey is not repudiated merely because the vendee has transferred the property to a third party, because the original vendee by selling the property does not render this reconveyance of the property an impossibility.⁹ Where pursuant to a contract delivery of goods was offered, but the buyer ordered only half of them to be delivered which was refused, the seller was entitled to rescind the contract and the buyer not entitled to recover damages for breach of the contract.¹⁰ Where the purchaser was to pay the balance of the purchase money within a month of approval of title by his solicitor but declined to pay it, in view of a threatened suit against the vendor regarding the land, until the disposal of the suit, the vendor was entitled to put an end to the contract on the ground that the purchaser had refused to perform his part of the contract.¹¹ If a contractor by his own conduct makes it impossible for himself to complete a building within the stipulated time the employer is legally entitled to put an end to the contract.¹² A contract with an undertaker for the removal of a dead body is one entire contract, where an essential part of it, viz., taking the body to the church cannot be carried out on account of default of the undertaker he is not entitled to recover anything on the contract.¹³ Where a road is closed by the municipality for repairs a toll contractor on that road is entitled to rescind the contract and to recover damages for breach of the implied contract to keep the road open to traffic.¹⁴ Where on the failure of a toll-collector to pay a *kist* the District Board gave notice of resale, this was a clear indication that the promisee had put an end to the contract. The pro-

3 *Rashiklal v. Ram*, 34 A 273; *Bajrangi v. Udit*, 10 CWN 932; *Motichand v. Sagun*, 29 B 46; *Bhagabati v. Narayan*, 31 B 552; *Makhan Lal v. Hanuman*, 2 Pat LJ 168.

4 *Subba Rau v. Devu Shetti*, 18 M 126; *Rajai v. Pandla*, 35 M 114.

5 *Tatia v. Babaji*, 22 B 176.

6 *Rajani v. Gour*, 35 C 1051.

7 *Thomas & Sons v. Harrowing S. S. Co.*, 1915 AC 58.

8 *Lovelock v. Franklin*, 15 LJQB 146.

9 *D. M. M. Lal v. L. P. Lal*, AIR 1973 All 16, 22.

10 *Tota Ram v. John's Flour Mill*, 10 IC 18.

11 *Ranganathan v. Parthasarathy*, 40 MLJ 23; see *Rasik v. Chandra*, 15 CLJ 410.

12 *Saranpat v. Punno*, 134 IC 779; Halsbury, 4th ed. vol. 9, para 549.

13 *Vigers v. Cook*, (1919)2 KB 475.

14 *President Dist. Board, Malabar v. Kenti*, 17 MLJ 390.

misee could not thereafter extend the time for performance.¹⁵ Where defendants agreed to deliver goods to the plaintiffs at Bombay and the plaintiffs undertook to secure a priority certificate, on the plaintiffs' failure to secure it, the defendants were absolved from their liability for the performance of the contract.¹⁶ "Where a condition in a contract that notice should be given of the arrival of the goods by a particular ship is not an essential part of the contract, failure to give such notice or a mistake in the notice given is not a breach of the contract entitling one party to avoid it for that reason".¹⁷ Where it was agreed between the parties that the plaintiff should abolish her bazar and the defendant should pay her annually Rs. 25 in lieu of her income from the bazar, and so long as the payment was continued the plaintiff undertook not to establish a bazar in the neighbourhood but she sold the site of the bazar, she was not entitled to any further payment, as she made it impossible to secure the fulfilment of the condition by parting with the land.¹⁸ A defendant contracting with the plaintiff to supply him for a period of 12 months as much flour as may be turned from the defendant's mill at a certain rate and to sell to nobody else does not bind himself to produce any stated quantity at all.¹⁹ An intending vendor can repudiate a contract for sale of land if he finds that the purchaser has regarded the contract as at an end or that a reasonable time has elapsed beyond which it was not right for the former to do nothing and sit down.²⁰

4. **Promisee may put an end to the contract.**—When a party to a contract purports to rescind it three courses are open to the other party. He can accept the position and so fulfil the requirements of the section. He can also act upon the rescission by going into the open market and purchasing his requirements; in either case he can sue the defendants for damages, the damages being calculated at the future date, on which the requirements will arise. If he do not adopt either of these alternatives he can ignore the repudiation and treat the contract as still subsisting, but if he do so it must inure for the benefit of both sides and S. 48 will apply. If he does not adopt either of the courses whereby he may put an end to the contract, he must inform the defendants of his requirements as they arise, so as to enable them, if they wish, to repent and to carry out their contracts so far as it affects the remaining instalments.¹ As has been said, a party may treat a contract as at an end (though not bound to do so), except for the purpose of bringing suit to recover damages for breach of contract, on receiving an intimation that the other party does not intend

15 *Gopalan v. Dist. Board, Malabar*, 145 IC 476.

16 *Basanta v. Uma*, 110 IC 835.

17 *South Indian Export Co. v. Condiiah*, 29 IC 712; but see *Rahimbux v. Topandas*, 107 IC 440.

18 *Sarat v. Bhuban*, 3 CWN 182.

19 *Chunilal v. Bapalal*, 2 Bom LR 351, *Queen v. Demers*, 1900 AC 103 *referred to*; for analogous law in the case of agency, see S. 205.

20 *Oosman v. Gurtajee*, 69 MLJ 536.

1 *Jawahar Singh v. Secretary of State*, 94 IC 635; *Bilasiram v. Gubbay*, 43 C 305; *Rash Behary v. Nrittya*, 33 C 477; *Manindra v. Aswini*, 48 C 427; *Nannier v. Raghu*, 93 IC 673; *Najan v. Saleh Mahomed*, 24 Bom LR

to perform his obligation under the contract. The first party, however, is not bound to accept the other party's repudiation of the contract nor to (elect to) treat the contract as at end.² Where the contract is not treated as at an end, if it be an entire contract to deliver a quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers a part, he cannot, before the expiration of that time, sue for the price of the part delivered, because the purchaser may yet return the part delivered. But if he retains the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods delivered.³

Where a charterer refused to perform his part of the contract and the owners did not at once accede to and act upon the repudiation as they might have done, but treated the contract as still subsisting, the contract was kept alive for the benefit of both parties.⁴ The meaning of the word "being kept alive for the benefit of both parties" will be understood from the following case. Where a ship proceeded under a charterparty agreement to Odessa, but the charterer refused to place any cargo on board and asked the master of the vessel to go away, but the latter insisted on having a cargo, ultimately the ship sailed away without a cargo, but within the period allowed for loading a war was declared, so that the performance of the contract became legally impossible before a breach by non-performance had occurred, *held*, the charterer was discharged as the renunciation of the contract by him had not been accepted by the master of the vessel.⁵ Refusal to perform unretracted up to the time of performance is a breach of the contract.⁶ So long as the repudiation remains unretracted the other party may, at any time prior to the date fixed for performance, acquiesce in the repudiation and by so doing terminate the contract.⁷

5. **Anticipatory breach.**—When there has been a repudiation of a contract by the plaintiff and its acceptance by the defendant, there arises, what is known as an anticipatory breach of the contract which gives the defendant the right to treat the contract as having been wrongfully terminated and to sue, if he thinks fit, for damages for such breach. An anticipatory breach of a contract is a breach before time has arrived for performance and is a matter of intention, the intention of one party to break the contract must be acted upon by the other party before the contract can be put an end to.⁸ In the case of forward contracts for sale the breach may occur before the time for the delivery of the goods has arrived. If the buyer gives notice that he will not take delivery or disable himself entirely from performing his part of the contract, this is an anticipatory breach which entitles the seller to rescind. When the seller has

² *Kyi v. Morrison*, 11 R 506.

³ *Oxendale v. Wetherell*, 9 B & C 386.

⁴ *Beyts v. Martin*, 16 B 389.

⁵ *Avery v. Bowden*, 26 LJ QB 3: 5 E & B 714: 6 E & B 953.

⁶ *Ripley v. M'Clure*, 18 LJ Ex 419.

⁷ *Jhandoo Mal v. Phul Chand*, 5 Lah 497.

⁸ *British & Beningtons Ltd. v. North Western Cachar Tea Co.*, 1923 AC 48; (1922) All ER Rep 224; *Bradley v. Newson Sons Co.*, 1919 AC 16; (1918-19) All ER Rep 625, *referred to in Jhandoo Mal v. Phul Chand*, 5 Lah 497.

rescinded he need not wait for the date of delivery but may sue at once.⁹ An election once made is final. Damages for breach are to be assessed from the date of election to rescind. A contract cannot be determined by one side alone except by performance.¹⁰ Where an assurance is given by the owners of a vessel that they honestly expect on reasonable grounds that the vessel would be ready to load on a specified date, but the charterers discover the falsity of the owners' assurance they are entitled to terminate charter forthwith that is, before the specified date.¹¹

6. **Contract of service.**—An employer is entitled to dismiss his servant or agent from service during the term notwithstanding a stipulation to employ him for a fixed number of years, if his connection raises a reasonable apprehension of injury to the reputation of the employer. Innumerable other circumstances may justify such dismissal,¹² but not the unprofitable nature of the master's business.¹³ Ordinarily, however, such a stipulation excludes any implication of a power to dismiss at pleasure,¹⁴ unless the master shows that the discharged servant had an opportunity of other employment, but refused to avail himself of it.¹⁵ The right to dismiss a servant of the crown at will and pleasure still exists, even though there is included in the contract of service an express term to the contrary.¹⁶ A contract to engage him for a fixed term, in the absence of a statute, is void. If there be no power of suspension the servant may claim damages for suspension.¹⁷ A servant suing for damages must show that he enjoyed some peculiar privilege.¹⁸ See as to the tenure of a servant appointed by the government.¹⁹ Mere extension to employees in a temporary establishment of certain privileges regarding pension and leave does not make them permanent employees.²⁰ Under S. 96-B of the Government of India Act 1915 and 1919 the dismissal of a person by an authority subordinate to the one who appointed him is inoperative.¹ A contract of service is continuing in its nature, its continuance and the obligation under it can only be terminated in certain defined modes. Mere resignation is not enough unless it be assented to or unless it complies with those terms which the law implies or the prior agreement of the parties may permit. The plaintiff by absenting from his duties does not determine the contract, it only gives the employer the right to

9 *Re Jivanji*, 19 IC 653, on app 27 IC 102; *Garnae Grain Co., Inc. v. H. M. F. Faure & Fairclough Ltd. v. Bunge Corpn.*, (1967)2 All ER 355 HL.

10 *Imam v. Rani*, 1937 N 289.

11 *Moredelanto Companies v. Bergbau-Mandal*, (1970)3 All ER 125.

12 *Boulton Bros. v. New Victoria Mills*, 119 IC 837.

13 *Muna v. Sona*, 1938 M 672.

14 *Reilly v. King*, 1934 AC 176; (1933) All ER Rep 179.

15 *Muna v. Sona*, 1938 M 672.

16 *Denning v. Secretary of State*, 37 TLR 138, relied on in *Jamun v. Secretary of State*, 16 Lah 1017.

17 *Secretary of State v. Surendra*, 1938 C 759.

18 *Lal Singh v. Secretary of State*, 1935 965.

19 *Hari v. Secretary of State*, 1936 L 282.

20 *Udho v. S. of S.*, 1936 L 85.

1 *Rangachari v. Secretary of State*, 1937 Mad 517.

determine the service. Where the plaintiff on the 5th of May intimated his intention not to perform the services to which he was bound, and the company by a letter dated the 13th dismissed him from service, there was an anticipatory breach which entitled the employer to determine the contract by dismissing the plaintiff.² Where a contract of service is for a definite period, and during the employment the servant is absent for definite period, but performs his master's duties, and the master does not elect to dismiss the servant, he is liable to pay the agreed wages for the full period,³ unless the discharged servant had opportunities of other employment but failed to avail himself of them. Employer cannot put an end to the employment because he finds his business to be not profitable or because he could get somebody else at a small salary.⁴ When a servant getting fixed monthly or yearly wages leaves his employment wrongfully in the course of a current month or year,⁵ or is rightfully discharged,⁶ he is not entitled to wages for the number of days he had actually served during that month or year. But when the master discharges him, whether on account of his negligence or non-performance of his duty, he is entitled to the wages for the period upto the time of his discharge without any deduction.⁷ An employee who had contracted to forfeit all arrears of wages in default of giving 15 days' notice before leaving service was held to forfeit all arrears of wages on leaving the service without giving the required notice.⁸ When a servant whose wages are due periodically (*e.g.*, monthly) leaves service without legal justification or without proper notice, he is not entitled to be paid for the portion of the time during which he served since the last periodical payment.⁹ A master claiming to retain a part of wages due to a servant can only claim it as set-off or damages.¹⁰ The master is also entitled to recover damages from the servant for the worry and labour caused by the sudden absence of the servant.¹¹ A servant engaged at a daily rate, but paid at the end of each month according to the number of days on which he has worked, is not a monthly servant. If he leaves service in the middle of a month he is entitled to his wages for the number of days he has worked.¹² See S. 212 Note 1.

7. **Insolvency of a party.**—When the buyer has become insolvent and the price of previous instalments of goods remains due, neither non-payment

2 *Ganesh v. G. I. P. Ry.*, 2 Bom LR 790; see *Hochester v. De La Tour*, 2 E & B 678: (1843-60) All ER Rep 12.

3 *Muna v. Sona*, 1938 M 672.

4 *Sundaram v. Choka*, 1938 M 672.

5 *Ralli Bros. v. Ambika*, 35 A 132, foling *Dhume v. Seven Oakes*, 13 C 80; *Ridgway v. Hungerford*, 3 A & E 171; per contra *Raghoonath v. Halle*, 16 WR 60; *Tribeni v. Jagarnath*, 1938 R 86; *Ethari v. Bellamy*, 1938 M 207.

6 *Tribeni v. Jagarnath*, (1937) 1 Rang 444.

7 *Tikaram v. Gendalal*, 147 IC 571.

8 *Empress of India Cotton Mills v. Naffer*, 2 CWN 687. fold in *Aryodaya S. W. Co. v. Siva*, 13 Bom LR 19.

9 *Amar v. Gopal*, 132 IC 577; *Pandurang v. Jairam*, 82 IC 727; *Maung Aung v. Ba*, 88 IC 612; *Ethari v. Bellamy*, 1938 R 207.

10 *Tribeni v. Jagarnath*, 1938 R 86.

11 *Municipal Council, Cuddalore v. Panchapakesa*, 69 IC 767.

12 *Arjoon v. Hormusjee*, 23 Bom LR 793.

of the instalments nor insolvency entitles the seller to rescind the contract, although he may refuse to deliver the goods till the arrears and the price of future instalments have been tendered to him.¹³ It is only when the insolvency of a party is declared or notified to the other, so that it can be inferred that there is no intention on his part to perform the contract, that the other is absolved from performance.¹⁴ Upon the bankruptcy of a party to a contract being notified to the other, the trustee in bankruptcy has the right to elect to fulfil the contract; if he does not, the other party is entitled to treat the contract as broken without making any tender of the goods to the trustee and the damages are the difference between the contract price and the price obtained on resale.¹⁵ The effect of a company going into liquidation on a contract entered into by the company before liquidation is the same as when a party to a contract becomes insolvent, namely, to put the trustee in place of the insolvent. Insolvency alone does not entitle the other party to treat the contract as broken.¹⁶ A declaration by the purchaser that he is carrying on the business at a loss and is short of working capital does not justify the vendor to refuse to deliver goods except on cash payment as it does not amount to a notice of insolvency. The declaration of insolvency must be such as to negative an intention on the part of the purchaser to pay for the goods.¹⁷

8. Waiver.—In order that there may be a waiver the promisee by his act or conduct must lead the other party to suppose that he did not intend to treat the contract for the future as at an end on account of the failure to perform the condition precedent but that it was still open for further performance.¹⁸ A delay of 2 years and 5 months in instituting a suit for specific performance of a contract to sell land was held not to be in any way instrumental in leading the vendor to infer abandonment or waiver, so as to debar the intending purchaser from asserting his rights to enforce the contract.¹⁹ Mere acceptance of a reduced rent by the landlord for a number of years does not deprive him of his right to claim rent at the stipulated rate. The principle of waiver must be strictly construed and should not extend to cases where the circumstances are not clear and conclusive.²⁰ The conduct of the defendants in not repudiating a contract which had been broken, but merely intimating that they would claim damages for the breach of the contract and allowing the plaintiff to continue to perform his part of the contract, amounts to a waiver of their right to repudiate the contract, to an "acquiescence in its continuance" under the terms of the section.¹ A purchaser may waive his right to have a good title made out by the vendor by going on with the agreement after he has full

13 *Re Edwards*, LR 8 Ch 289: (1861-73) All ER Rep 958.

14 *Ex. p. Carnforth Hematite Iron Co.*, 4 Ch D 108; *Morgan v. Bain*, LR 10 CP 15.

15 *Re Nathan*, 10 Ch D 586: (1874-80) All ER Rep 1182.

16 *Currimbhoy v. Creet*, 57 C 170, see the law fully discussed.

17 *Re Phoenix B. Steel Co.*, 4 Ch D 108.

18 *Bentzen v. Taylor*, (1893) 2 QB 274, 283: 63 LJ QB 15.

19 *Kadu v. Maharaj*, 104 IC 658.

20 *Kuman v. Radhika*, 124 IC 625.

1 *Sassoon v. Dossa*, 15 IC 757.

notice that he is not to expect a good title.² A breach of warranty may be impliedly waived, as has been said in *Samuel v. Dumas*.³ "A right may be waived either by express words or by conduct inconsistent with the continuance of the right".⁴ The mere omission to claim interest for past years from a tenant cannot amount to a waiver of the landlord's right to claim interest at the stipulated rate.⁵ Waiver depends upon evidence of fact.⁶ The onus of proving waiver is on the person who alleges it;⁷ waiver must be an intentional act with knowledge.⁸ As pointed out in *Duke of Leeds v. Amherst*,⁹ there is a distinction between a case where the alleged acquiescence occurs while the act acquiesced in is in progress and where the acquiescence takes place after the act is completed. An agreement once waived cannot be enforced.¹⁰ Waiver is contractual and may constitute a cause of action. It is an agreement to release or not to assert a right. Therefore, whenever, a waiver is pleaded, it should be shown by the party pleading the same that there was an agreement between them that the person waiving a particular right should not press that right in future in consideration of some compromise from some other person.¹¹

By whom Contracts must be performed

40. Person by whom promise is to be performed.—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

Contracts to be performed by the promisor himself.—Where goods are ordered of a particular manufacturer another, who has succeeded to his business,

² *Ogilvie v. Foljambe*, 3 Mer 53: (1814-23) All ER Rep 262.

³ 1924 AC 431, 442.

⁴ *Kanahaya v. A. Generalli*, (1988) 2 C 400.

⁵ *Johoery v. Bullab*, 5 C 102, fold in *Shyama v. Heras*, 26 C 160.

⁶ *Edridge v. Sethna*, 58 B 101 PC.

⁷ *Rolland v. Cassidy*, 13 AC 770, 778 reld to,

⁸ *Kishindas v. Menghraj*, 81 IC 884.

⁹ 15 LJ Ch 351, 41 ER 886.

¹⁰ *U. P. v. G-J, E. D. Co.*, 1948 PC 159.

¹¹ *Dawson Bank Ltd. v. Nippon Menkwa Kabushiki Kaish*, AIR 1953 PC 79; *Madams v. Satyanarayana v. G. Velloji Rao*, AIR 1965 SC 1405.

cannot execute the order so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy.¹² Similarly, a contract of service is determined on the death of a partner as the contract is made with reference to the existing partnership business, and the business after the death of one partner might be a wholly different one and much less lucrative to the plaintiff.¹³

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person, *e.g.*, promises to marry, to serve for a certain time, to write a book, to paint a picture. Such a contract may be absolute in its terms yet there is in it an implied covenant of the possibility of performance of the contract.¹⁴ In order to ascertain whether any and what term should be implied in a written contract the guiding principle is the presumed intention of the parties. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side.¹⁵ A contract for remuneration for work done by a person is determined by his death, but the right to remuneration survives to his executors.¹⁶ In respect of a purely personal contract the right to sue does not enure in favour of the executors.¹⁷ A contract by a jockey to ride the horses of an owner is dissolved by the death of either party. Where a contract is terminated by some contingency which renders it impossible of further performance and that contingency has not been provided for by any special stipulation in the contract, the contract is avoided from that date. That does not mean that it is avoided *ab initio*, it does not mean that rights which have already accrued under it are not enforceable, but it means that as from that date no claim can be maintained in respect of rights which only accrued after the dissolution of the contract. The case of dissolution of a contract by the death of one of the parties is simply one illustration of many conditions of impossibility under which a contract may be dissolved.¹⁸ Where a father enters into a contract to keep his boy in a particular school he is excused from performance if in consequence of the illness of his son he be unable to perform the contract.¹⁹ A party entering into a contract for personal service, *e.g.*, to sing at a theatre, is excused from performance by illness. The contract in such a case is not absolute but conditional upon the party being well enough to carry out his promise.²⁰ The illustrations indicate the class of contracts

12 *Boulton v. Jones*, 2 H & N 564: 27 LJ Ex 117.

13 *Tasker v. Shepherd*, 6 H & N 575: 30 LJ Ex 207.

14 *Taylor v. Caldwell*, 3 B & S 826, 835-6; *Baily v. De Crespigny*, LR 4 QBD 180, 185: (1861-73) All ER Rep 332.

15 *The Moorcock*, 14 PD 64, 68: (1886-90) All ER Rep 530, cited in *Browning v. Crumlin Valley Collieries*, (1926) 1 KB 522, 528: (1926) All ER Rep 132.

16 *Wilson v. Harper*, (1908) 2 Ch 370; *Stubbs v. H. Ry.*, LR 2 Ex 311: 36 LJ Ex 166.

17 *James v. Morgan*, (1909) 1 KB 564.

18 *Graves v. Cohen*, 46 TLR 121.

19 *Boast v. Firth*, LR 4 CP 1, fold in *Simeon v. Watson*, 46 LJCP 679.

20 *Robinson v. Davison*, LR 6 Ex. 269: (1861-73) All ER Rep 699.

which the legal representatives of a dead man cannot be asked to perform, e.g., painting a picture, and the class which a legal representative must perform, e.g., the payment of the balance of the purchase money.¹

Contracts not personal.—Much work is contracted for which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party by whom it is done, whether it is done by the immediate parties to the contract or by someone on his behalf.² In the absence of any intention of the parties to the contrary the legal representatives have a right to require performance of and are bound by the promise of the deceased.³ Where plaintiffs, a troupe of music hall artistes, entered into a contract with a company to give two series of performances, the personnel of the company was not known to the plaintiffs, and shortly after one of the partners of the company died, the contract was not thereby put an end to. The principle of law is that it must be determined in each case whether the obligation which it is sought to enforce depended upon the personal conduct of the deceased party.⁴

41. Effect of accepting performance from third person.—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

The section.—The law as enacted in the section has been adopted from the Roman law and is a departure from the early English law on the point. In England a payment made by a third party without the authority of the debtor was held inoperative to discharge the latter. In *Cook v. Lister*,⁵ this doctrine was assailed and the Indian rule was presumably based on the observations in that case. Modern English opinion seems however to agree with the law as contained in the section. What is required by the section is actual performance and not a substituted promise. According to the section performance by a stranger accepted by the promisee produces the result of discharging the promisor, although the latter has never authorised nor ratified the act of the third party.⁶ Where A owes a large sum money to B, and C offers to pay B a lesser sum in full satisfaction of B's claim, B cannot recover balance from A after receiving payment in full satisfaction from C.⁷ The section applies only where a contract has been in fact performed by some person other than the person bound thereby and not where there has been an infructuous attempt

1 *U. Dun v. Aw*, 122 IC 240.

2 *British Waggon Co. v. Lea*, (1874-80) All ER Rep 1135; 5 QBD 153; see *Tod v. Lakhmidas*, 16 B 441, 451.

3 *Vaman v. Changi*, 49 B 862.

4 *Phillips v. Alhambra Palace*, (1901) 1 QB 59; Halsbury, 4th ed, vol 9, para 477.

5 82 LJCP 121.

6 *Chegamul v. Govinda*, 112 IC 491.

7 *Kapurchand v. Himayatullahan*, AIR 1963 SC 250.

at performance.⁸ In order that a debtor may be discharged by a payment made by a third person it must be made and accepted in reference to the debt and on behalf of the debtor. The offer and acceptance of a voluntary debt does not discharge the debtor.⁹ If a stranger pays a debt the creditor may refuse to credit it on the debtor's account, then the stranger may sue to recover the money.¹⁰ A vendor who receives payment from a pre-emptor has his claim against the vendee satisfied to that extent.¹¹

42. Devolution of joint liabilities.—When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor, or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

The section.—This section varies the common law rule as to the effect and devolution of liabilities under joint contracts. "The principal object of the present section is to establish the rule applied by courts of equity when partnership assets have to be administered on the death of one of the partners and to abolish the common law rule of survivorship. According to the section, the liability in respect of a joint debt is, for the purpose of any claim made after the death of one of the joint debtors, in no way different from the liability in respect of a joint and several debt".¹² The ordinary rule in English law is that if the liability is joint and several, the executor of a deceased contractor is liable along with the surviving contractors, but if it be joint, the surviving contractor or contractors alone is or are liable.¹³ The rule of survivorship among joint tenants (as is applicable, *e.g.*, under the Agra Tenancy Act) is modified by this section and S. 45 which put the representative of the deceased joint tenant in his place so long as there is such a representative. On failure of such a representative the rule of survivorship among joint tenants applies. The rule laid down in these two sections does not override any special rule contained in any enactment in force in British India.¹⁴ Under the section all joint promisors are liable to fulfil the contract. The promisee may compel any one or more of joint promisors to perform the whole of the promise. One of the joint promisors performing the promise is entitled to contribution.¹⁵

8 *Har Chandi v. Sheoraj*, 44 IA 60; *New S. Bank v. Probodh*, 1942 C 87; *Dhanpat v. Niapat*, 1933 L 335.

9 *Belshaw v. Bush*, 22 LJCP 24: 138 ER 444, cited in *Ex. p. Derenburg*, (1904) 2 KB 483: 73 LJ KB 594.

10 *Narayan v. Vishnu*, 2 Bom LR 706.

11 *Mubarak v. Adittya*, 17 IC 288.

12 C & S 193, *Kendall v. Hamilton*, 4 AC 504: (1874-80) All ER Rep 932 *refd. to*.

13 *Hill's Case*, LR 20 Eq 585: 44 LJ Ch 423.

14 *Sumaru v. Puddan*, 159 IC 352.

15 *Narendra v. Pashupati*, 1949 C 242.

Different kinds of promises.—A promise by more than one person may be a joint promise or a joint and several promise or several promises. "By the law of England, where several persons make a joint contract, each is liable for the whole, although the contract be joint," (see S. 43). When two or more are jointly bound, although neither of them is bound by himself, yet neither of them can say, that the bond is not his deed, each of them is bound in the whole. The defendant, when sued alone, cannot say that he did not promise. Proof of a joint contract is sufficient to sustain an allegation that one contracted.¹⁶ A joint and several note, however, of A and B, though on one piece of parchment or paper, is in effect, three notes—the joint note of A and B, the several note of A and the several note of B. Thus, to a debt due from the defendant to the plaintiff the former may set off the latter's joint and several promissory note payable to the former.¹⁷

No particular words are necessary to constitute a covenant of either kind, that is to say, either joint or several. In considering that question the court has to look at and consider the whole instrument. "If two persons covenant generally for themselves, without any words of severance, or that they or one of them shall do such a thing, a joint charge is created".¹⁸ Where parties mean to render themselves liable separately and not jointly the contract is several. There have been cases where words which would appear to have that effect, *e.g.*, the word "several" in a contract, have been held to constitute a joint contract.¹⁹ The question whether a contract is joint or several must be determined by a careful scrutiny of the language used, giving to that language its natural grammatical meaning. Where parties bind themselves jointly and severally by the use of any appropriate words the liability is joint and several.²⁰

There is a distinction between a promise *by* two or more persons to perform an act and a promise *to* two or more persons to perform an act. A promise by two or more persons is a promise that they or some or one of them will perform it¹; but a promise to two or more persons to perform an act is not a promise to some or one of them but a promise to all of them to perform it.² In the former case the entire promise may be performed by one. In the latter case the entire promise cannot be enforced by one. A right may belong to two or more individuals severally or jointly but not jointly and severally.³ The question whether a contract is joint or several or joint and several is a question of construction of the parties to be determined by considering not only the language but also the interests and relations of the parties.⁴

16 *Richards v. Heather*, 1 B & Ald 29, 35: 106 ER 11.

17 *Owen v. Wilkinson*, 28 LJCP 3.

18 *White v. Tyndall*, 13 AC 263; but see *National Society v. Gibbs*, (1900) 2 Ch 280.

19 *Lee v. Nixon*, 1 A & E 201: 110 ER 1183: 3 LJ KB 160.

20 *Burns v. Bryan*, 12 AC 184.

1 *Addison v. Gibson*, 10 QB 106: 116 ER 42: 16 LJ QB 165.

2 *Rolls v. Yate Yelverton*, 177.

3 *Slingsby's Case*, 5 Co. 18 b.

4 *Mohamed v. Akramul*, 6 CLJ 558.

43. Any one of joint promisors may be compelled to perform.—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any [one or more]⁵ of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.—Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.—If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts, C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

(c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

1. **The section.**—The section is one of the series of sections materially altering the rules of English common law as to the devolution of the benefit of and of the liability under joint contracts. The English rule corresponding to that laid down in the section is that "all joint contractors must be sued jointly for a breach of contract." Under this section a promisee may at his option sue one or more of the joint promisors and the rule applies to the case of the members of a partnership firm. The promisee can select those partners against whom he wishes to proceed, allowing his right of suit against such as he does not make defendants to be barred. The rights of the partners, the joint promisors, *inter se*, are saved by a later clause of the section. Great inconvenience may result from the application of S. 45 to partners. But the words of the two sections are not identical; it would be an unsound principle

⁵ Substituted for the original word "one", by s. 2 and Sch. II of the Amending Act, 1891 (XII of 1891).

against all.⁵ Receipt by one co-assignee of his own share of a mortgage debt is not receipt on behalf of the others.⁶ Promise made jointly by one or more members of an unincorporated association can be sued upon by the promisee.⁷

Both Section 43 of the Contract Act and Section 82 of the Transfer of Property Act deal with the question of contribution. Section 43 deals with contracts generally, while Section 82 applies to mortgages. Where the right of contribution arises out of a mortgage, Section 82 must exclude Section 43, for a special law dealing with a particular matter always excludes the general law relating to the same.⁸

2. **Different suits.**—In some old cases it was laid down that the section did not enable a promisee to sue one or more of his joint promisors severally in two or more suits; in other words, to change a joint liability into a several one at the option of the promisee.⁹ In subsequent cases however this view of a single obligation which can be enforced once only has not found support. It has been pointed out that the effect of the section being to exclude the right of a joint contractor to be sued along with his co-contractor, the rule laid down in *King v. Hoare*¹⁰ is no longer applicable to cases arising in India, so that a judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract against the other joint contractors.¹¹ Omission in a previous suit against one of several joint promisors of a part of the cause of action is not a bar to a subsequent suit against another joint promisor for the balance so omitted.¹² A suit against one joint promisor, therefore, cannot in any way affect the rights against the other promisors. But a demand upon a joint promisor cannot be deemed to be a demand upon any of the other joint promisors.¹³ It has been pointed out in *Re Vallibhai*¹⁴ that there is some difference of opinion among different High Courts as to the effect of a decree obtained against one co-promisor only on the promisee's right to proceed by a separate suit against the other co-promisors. The earlier decisions in Calcutta and Madras adopted the rule in *King v. Hoare*¹⁵ and held that a decree against one was a bar to a subsequent suit against the other. The Allahabad High Court has held¹⁶ that where the obligation is not joint but is joint and several, the doctrine that a judgment debt is merged in a

5 *Nathusa v. Mahadeo*, 1933 N 324.

6 *Kundan v. S. of S.*, 1939 O 240.

7 *Patro v. Subudhi*, 1949 P. 184.

8 *Kedar Lal v. Hari Lal*, AIR 1952 SC 47.

9 *Hemendro v. Rajendro*, 3 C 353; *Gurusami v. Samurti*, 5 M 37; *Shivlal v. Birdichand*, 19 Bom LR 370. 380; *Markandrai v. Virendrarai*, 19 Bom LR 837, 843.

10 13 M & W 490 and in *Kendall v. Hamilton*, 4 AC 504: (1874-80) All ER Rep 982; see *Beckett Ramsdale*, 31 Ch D 177: (1881-85) All ER Rep 931.

11 *Muhammad v. Radhe Ram*, 20 A 307; *Dick v. Dhunji*, 25 B 378, 383.

12 *Ramanjulu v. Aravamudu*, 33 M 317, cited in *Moolchand v. Chetty*, 39 M 548; *T. Radhakrishna v. Muthukrishna*, AIR 1970 Mad 337, 341.

13 *Nagendra v. Subbu*, 158 IC 1183.

14 35 Bom LR 881; see also *National P. Co. v. Popatlal*, 38 Bom LR 610.

15 13 M & W 494.

16 *Muhammad v. Radhe*, 20 A 307.

judgment against one debtor does not apply and if such a judgment remains unsatisfied it is no bar to a suit against the other. A different view has been adopted by the Bombay High Court.¹⁷ The earlier Madras decisions have not been followed in subsequent cases in the same High Court.¹⁸ It seems, therefore, safe to conclude that a judgment against one joint and several promisor is no bar to a subsequent suit on the contract against the other.¹⁹

3. Suits against partners and tenants.—It follows that it is not incumbent on a person dealing with partners to make them all parties. He is at liberty to sue any one partner that he may choose.²⁰ Where the partners of a firm are jointly and severally liable one of them may be called upon to liquidate the whole debt.¹ A partner making an advance to a firm is not only a promisee of the firm but is also one of the joint promisors to himself, and under the section he can call upon each of the other joint promisors to contribute equally to the payment to be made to himself as promisee.² O. 15, r. 2 of the Civil Procedure Code gives the court absolute discretion either on application or *suo motu* to dismiss or add parties. In an action commenced against several joint debtors judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others.³ Under the English common law the liability of parties is considered to be joint, and if a creditor of a firm obtains judgment in an action brought against only one of its partners, he loses his remedy against the other partners when he recovers judgment, even though the judgment remains unsatisfied. The section, however, makes the liabilities of all joint contractors joint and several and allows a promisee to sue one or more of the several joint promisors as he chooses and excludes the right of one of them to be sued along with his copromisor. There is a difference between a joint liability and a joint and several liability. In the case of a joint promise the obligation is single and entire and is extinguished by a judgment and decree in a suit against any of the joint promisors. In the case of a joint and several promise the position is different. The creditor in that case has as many joint causes of action as there are co-promisors and can bring as many actions as there are copromisors. The section applies to partners as well as to other contractors.⁴ In a suit brought upon a contract made by a partnership firm, the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed,⁵ the non-joinder of a copromisor is no ground of defence to such a suit.⁶ A plaintiff cannot ask for a decree against a firm if

17 *Shivlal v. Birdichand*, 19 Bom LR 370; *Markandrai v. Virendrai*, 19 Bom LR 837.

18 *Ramanjulu v. Aravamudy*, 33 M 317; *Moolchand v. Alwar*, 39 M 548.

19 *Re Vallibhai*, 35 Bom LR 881; *National P. Co. v. Popatlal*, 38 Bom LR 610.

20 *Narayan v. Lakshmana*, 21 M 256; *Appa v. Ram*, 53 B 652, 667; *Muhammad v. Saadud Din*, 9 Lah 214; *Jag Lal v. Shib Lal*, 37 PR 1902.

1 *Liquidator Union Bank v. Gobind*, 77 IC 338.

2 *Govind v. Gajraj*, 64 IC 183.

3 *Dick v. Dhunji*, 25 B 378.

4 *Motilal v. Ghellabhai*, 17 B 6, per contra *Lakshmishankar v. Vishnuram*, 24 B 77, *rejd. to in Re Vallibhai*, 35 Bom LR 881.

5 *Lakshmidas v. Purshotam*, 6 B 700.

6 *Jaglal v. Shib Lal*, 37 PR 1902, *rejd. to. in Muhammad v. Saadud Din*, 19 Lah 214.

some of its partners have been sued in their individual and private capacity.⁷ The liability of tenants under this section to pay rent is joint and several; the landlord is entitled to bring a suit against one of them and realise the whole rent from him.⁸ But in order that the decree and the sale in execution of it may have the important consequences described in Chapter 14 of the Bengal Tenancy Act, ordinarily all the tenants of a holding are necessary parties to the suit.⁹ The section speaks of two or a more persons making a joint promise, it can have no application where parties become jointly interested by operation of law in a contract made by a single person. Thus in a suit by a landlord against the heirs of the original tenant a decree cannot be passed against one of the heirs only for the entire claim as it is not the case of a joint contract.¹⁰ Where cotenants have promised to pay rent to the landlord, any of the co-promisors may be compelled to carry out the whole contract. The landlord, on buying up the interest of one of the cotenants, is not entitled to sue the others for payment of rent for he cannot compel them to do what he himself is bound to do.¹¹

4. Contribution.—‘Contribution’ signifies payment by each of the parties interested of his share in any common liability. Mutuality is thus the test of contribution.¹² The right of contribution comes in equity by the payment in discharge of a common burden and has no existence whatever, inchoate or complete, till the payment is made. The right of each joint promisor to compel every other joint promisor to contribute equally with himself to the performance of the promise is unaffected by the mode in which the promisee exercises or fails to exercise his right (i) to compel all the joint promisors to fulfil the promise (S. 42), or (ii) to compel any one of them to do so (S. 43), or (iii) to release one without discharging the other or others. Thus an express release by the promisee cannot affect the right of a joint promisor, nor will an exoneration by the promisee on the ground of limitation affect the joint promisor’s liability to contribute. The right to sue for contribution arises only on payment. A promisee is entitled to realise the entire sum due to him from all the promisors, or any one of them, including one who is only a surety. Contribution from such surety can be levied by any one of the promisors only for the excess amount (over and above his share) which he would have had to pay to absolve himself from liability to the original promisee. If one of the parties liable to contribute did not or could not pay his proportion, that amount has to be levied between the other contributories only in the proportion of the benefit which each of them has received at the time of the original contract and not

7 *Ram v. Munshi*, 31 IC 209.

8 *Nirdosh v. Jakaria*, 20 CLJ 492; *Livingstone v. Feroz*, 27 IC 94; *Raghunath v. Baleswar*, 7 Pat 353, 361; *Jagan v. Brojendra*, 53 C 197 FB; *Manbodh v. Jaswant*, 17 Pat 662.

9 *Chamatkari v. Triguna*, 17 CWN 833; *Lalit v. Haran*, 36 IC 243.

10 *Sahad v. Krishna*, 24 CLJ 371.

11 *Kuman v. Kameshwar*, 156 IC 352.

12 *Satya v. Krishna*, 24 IC 259 cited in *Radhashyam v. Ananga*, 151 IC 626; Halsbury, 4th ed., Vol 9, Paras 654-659.

in equal proportion.¹³ According to English law the fact that a debt is a judgment debt makes no difference, a release in favour of one judgment debtor operates in favour of others; but in this country a release by a decreeholder of some of the joint judgment debtors from liability under the decree does not operate as a release of other judgment debtors from their liabilities.¹⁴ The principle of the doctrine of contribution between sureties has been thus stated:¹⁵ "The principle established in the case of *Dering v. Earl of Winchelsea*¹⁶ is universal that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound." Again, it has been pointed out that the right of contribution has its foundation and is controlled by the principles of justice, equity and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract, for contribution is supposed to exist between parties jointly liable *ex contractu*. Every joint debtor who has been compelled to pay more than his own share of the common debt has the right of contribution from each of his codebtors. The principle is that one who has discharged a common liability can recover from his co-obligors only for the excess that he has paid over his share and each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation. It is not necessary that the debt should have been satisfied by the plaintiff, but he must establish that he has paid more than his share of the joint liability.¹⁷ A person bound to contribute to cost of repair of a tank is not liable to contribute to the cost incurred for protection of a railway line going near the tank.¹⁸ A claim by way of contribution for a valid and *bona fide* payment made by a vendor lies against the co-vendors, a claim need not be based on their consent or acquiescence.¹⁹ If the plaintiff and the defendant borrow money and the plaintiff repay the entire amount to the creditor he is entitled to contribution from the defen-

13 *Abraham v. Raphial*, 39 M 288, 292 see *Ram v. Neerbhoy*, 11 BLR 76, before the Act; *Narendra v. Pashupati*, 1949 C 242, *Padmanabha v. Keshava*, 1951 M 239: (1950)2 MLJ 438.

14 *Moolchand v. Chetty*, 39 M 548.

15 1 W & TLC 5 Ed, 112, cited in *Ramskill v. Edwards*, 31 Ch D 100.

16 1 Cox 318.

17 *Matangini v. Brojeswar*, 20 CLJ 205, 209.

18 *Anna v. Kutti*, 1947 M 189.

19 *Sadasiva v. Palakurthi*, 144 IC 726.

20 *Nityanand v. Radha*, 148 IC 434.

1 *Nityanand v. Radha*, 148 IC 434.

2 *Khairati v. Diwan*, 141 IC 190.

3 *Venkata v. Lakshmi*, 116 IC 129; *Nityanand v. Radha*, 148 IC 434.

4 *Cunningham v. City of Glasgow Bank*, 4 AC 607.

dants.²⁰ All the executants of a promissory note are jointly liable under it and if one alone makes the payment he is entitled to contribution from the others in the absence of a provision excluding their liability for the performance of the promise. The question whether the loan was really taken by one alone does not arise for determination in such a case. Under this section, Explanation, and S. 132 it is open to the other signatories to prove that they entered into the contract merely as sureties.¹ If one of the several copromisees or creditors is added as a defendant after the expiry of the time prescribed for the institution of the suit, a suit instituted by one of the creditors or copromisees for the recovery of the whole amount is maintainable.² It is open to any of the executants of a joint promissory note to keep alive the debt due on the note without reference to his co-obligor, and if the creditor can obtain a decree against him alone, the claim against the others being barred by limitation, the debtor who is obliged to pay the entire debt can claim contribution from his co-debtors though the creditor's claim against them is barred.³ Each joint contractor is liable for the whole amount as a contributory on the winding up of a company and not for his proportionate share of the amount.⁴ A defendant cannot proceed against a codefendant for contribution in respect of costs to which both are equally liable.⁵ To support a claim for contribution, there must be either a contract or agreement, or some equity arising from the consideration that the claimant has satisfied the whole of a common liability, a portion of which ought to have been borne by the opposite party.⁶ A codebtor is not liable to contribute to a payment made to the decree-holder when the codebtor has not been exonerated from the liability and when the original obligation is still outstanding.⁷ Principal and surety are jointly and severally liable to the creditor, but the surety is entitled to compel the principal debtor to pay what is due from him so that the surety may be relieved.⁸ The remedy of a partner, or a representative of a partner, compelled to discharge more than his own share of the partnership debt, is by a suit for partnership accounts and not for contribution.⁹

5. Contribution among wrongdoers.—When a joint decree is passed against several persons, no suit for contribution will lie as between them if they are wrongdoers in the sense that they know or ought to have known that they are doing an illegal or wrongful act. But if they are not guilty of wrong in that sense, but act under a *bona fide* claim of right and has reason to suppose that they have a right to do what they did, then there is a right of contribution *inter se*.¹⁰ Therefore if an act is manifestly unlawful, or the

5 *Dearsley v. Middleweek*, 13 Ch D 236; *Kristo v. Wise*, 14 WR 70; *Venkayya v. Basivireddi*, 71 MLJ 238; but see *Fakire v. Tasadduq*, 19 A 462; *Muthuswami v. Subramania*, 61 MLJ 638; *Khoka v. Mahendra*, 41 CWN 174.

6 *Ananda v. Panchu*, 59 CLJ 423.

7 *Abhoy v. Rama*, 76 IC 905.

8 *Ascherson v. Tredegar Dry Dock Co.*, (1909)2 Ch 401.

9 *Chettiar v. Chettiar*, 1949 M 109.

10 *Hari v. Jotindra*, 5 CWN 303; *Merryweather v. Nixan*, 8 TR 186; *Sreeputty v. Loharam*, 7 WR 384 FB, *Brojendra v. Rash Behari*, 13 C 300 reld. to; *Mohesh v. Boydia Nath*, 6 CWN 88; *Krishna v. Rakmini*, 9 A 221.

doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom.¹¹ A breach of contract is not the same as a wrong committed independently of contract.¹² Where a decree for costs against two defendants jointly was executed against one of them who had set up a false defence in the suit in collusion with the other and the former brought a suit to recover one moiety of the amount paid by him from the latter, the suit was held not to lie.¹³ It has however been doubted,¹⁴ how far the rule laid down in *Merryweather v. Nixan*,¹⁵ should be followed in India. It will certainly not be extended. Thus, where the defendants agreed to pay Rs. 8,000 to the plaintiff under a consent decree irrespective of any tort they might have committed, the sum in no way represented a decree for damages against tortfeasors, therefore, if any of the judgment debtors paid the entire amount he was entitled to contribution against the others.¹⁶

44. Effect of release of one joint promisor.—Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Release of a joint promisor.—Under the English law a release of one joint promisor without expressly reserving the remedies against the other promisors would release them.¹⁷ But the section was apparently expressly inserted for the purpose of modifying the English law.¹⁸ The position as regards joint debtors is the same in principle as that as regards joint promisors under the section, a release granted to or an omission to sue one of the joint debtors without the consent of the others does not absolve the latter from liability.¹⁹ The meaning of the section is that a release of one of several contractors does not discharge the co-contractors. The section applies to a release to a man from his promise before breach and also to discharge after breach.²⁰ The rule applies to judgment debtors, so that a creditor cannot be deprived of his statutory right to proceed against a judgment debtor in spite of a release by reason of the fact

11 *Burrows v. Rhodes*, (1899) 1 QB 816, 826; (1895-99) All ER Rep 117.

12 *Lakshmana v. Rangasami*, 17 M 78.

13 *Vayangara v. Pariyangot*, 7 M 89, fold. in *Govind v. Srigobind*, 24 C 330.

14 *Siva v. Jagusti*, 25 M 599; *Muthuswami v. Subramania*, 1932 M 146.

15 8 TR 186, commented in *Palmer v. W. & P. S. S. Co.*, 1894 AC 318.

16 *Nihal Singh v. Collector of Balandshahr*, 38 A 237.

17 *Ex p. Good*, 5 Ch D 46; *Re E. W. A.*, (1901) 2 KB 642, 652; *Jenkins v. Jenkins*, (1928) 2 KB 501; (1928) All ER Rep 546; *Wilkinson v. Lindo*, 10 LJ Ex 94; 151 ER 687; for the reason of rule see *North v. Wakefield*, 18 LJ QB 214.

18 *Krishna v. Sanat*, 44 C 162, 173.

19 *Daulat v. Punjab National Bank*, 144 IC 981; *Moolchand v. Alwar*, 29 IC 303; *Vellian v. Woomidy*, 29 IC 760; *San Ya v. P. R. Firm*, 165 IC 338; *Arjun v. Banbehari*, 1944 C 328.

20 *Kirtes Chunder v. Struthers*, 4 C 336.

that the contractual debt has merged in a judgment debt.¹ If a suit brought against several persons as liable on a joint contract has been dismissed, an appeal cannot be preferred against some of them only.² It follows from the section that the release of a part of a mortgage security in favour of some of several joint mortgagors, resulting from the mortgagee seeking to enforce his right as against any surplus sale proceeds of such part when sold in satisfaction of a prior mortgage, ought not to affect the mortgagee's right.³ A distinction is drawn in English law between a release and a covenant not to sue; in the case of the latter the co-contractor remains bound, the reason being that the joint action is still alive.⁴

45. Devolution of joint rights.—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

The Section.—S. 42 deals with the devolution of joint liabilities. This section lays down the general principle which governs the devolution of the rights of joint tenants and operates in cases not provided for in special enactments.⁵ It lays down two rules. In the case of a joint promise all the joint promisees must join in suing the promisor. This is consistent with the English law. The concluding part of the section departs from the English law and lays down the rule of survivorship as an incident attached to joint promises. Under the section, in regard to a promise to pay made to two or more persons jointly, the proceedings to enforce the claim must be taken by all the promisees, a suit for his share of the amount brought by one of several joint creditors or partners is liable to be dismissed.⁶ Ss. 42 and 44, as already noted, embody exceptions to the common law of England. S. 45 is consistent only with joint

1 *Moolchand v. Alwar*, 39 M. 548.

2 *Jogesh v. Bama*, 34 IC 138.

3 *Ganga v. Jaiballav*, 30 C 953, 957.

4 *Duck v. Mayeu*, (1892) 2 QB 511; (1891-94) All ER Rep 510; *Price v. Barker*, 24 LJ QB 130.

5 *Rasulan v. Babu*, 52 A 548.

6 *Kisanlal v. Chendba*, 75 IC 917. The question of payment to one of several joint promisees has been discussed under S. 38 n. 10; *Raghunath v. Prana*, 166 IC 992.

promisees being regarded as tenants-in-common.⁷ The section does not provide that when one of the original creditors has been paid off his share of the debt and has thus ceased to be a creditor, the remaining creditors cannot maintain a suit for the balance of the debt. The words "as between him and them" signify that as between the debtor and the original body of creditors the right to claim payment would rest with that body; but if by part payment the number of creditors is reduced, the right to claim payment will be a right arising as between the debtor and the remaining creditors.⁸ Under the section a claim cannot be enforced by one alone of the promisees all of whom are jointly interested. So in the case of joint mortgagees one alone cannot ordinarily maintain a suit on the mortgage which is one and indivisible.⁹ The devolution of interest of a mortgagee on his heirs being by way of succession under the Hindu Succession Act, all the heirs are tenants in common in relation to that interest and they should bring their suit jointly or, at any rate, should be included as plaintiffs or defendants.¹⁰ A co-promisee refusing to join as plaintiff may be made a co-defendant and the suit will not be bad.¹¹ Where the debtor makes payment to one of the joint creditors, the remaining creditor or creditors can sue for the entire debt.¹²

The section relates to partners as well as to co-contractors.¹³ Co-sharers must all be made parties.¹⁴ In the absence of a special provision of law, co-owners are not permitted to sue through some or one of their members, but all must join in a suit to recover their property. Nor can the defendant be deprived of his right to insist on the other co-owners being joined on the record by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone.¹⁵ It may be open to doubt whether the section has any application to a claim for possession of land. One of several joint promisees cannot sue for specific performance of the agreement. The provisions of the section apply to a contract of mortgage. One mortgagee, therefore, cannot sue on a joint mortgage.¹⁶

As a general rule all the members of a partnership firm ought to be joined as plaintiffs in a suit brought in respect of a transaction with the partnership. It makes no difference that the persons carrying on business together are also members of a Hindu family.¹⁷ The representatives of a deceased partner must

7 *U.Po. v. Latchumanan*, 1937 R 227.

8 *Bhagmal v. Walia*, 53 IC 416.

9 *Sital v. Asho*, 69 IC 677; *Munshi v. Bhupal*, 1936 Pat 274; Halsbury, 4th ed. vol. 9, para 618.

10 *P. G. Reddy v. Golla*, AIR 1971 AP 363.

11 *Shital v. Manik*, 9 CLJ 331; *Pyari v. Kedarnath*, 26 C 409 FB.

12 *Govindlal v. Firm Thakurdas*, AIR 1974 Bom 164, 168-69.

13 *Aga Gulam v. Sassoon*, 21 B 412, 421.

14 *Ramkrishna v. Ramabai*, 17 B 29.

15 *Balkrishna v. Mahad Municipality*, 10 B 32; *Kattusheri v. Vallotil*, 3 M 234, *Kalidas v. Nathu*, 7 B 217 reld. to.

16 *Muhammad v. Muhammad*, 12 IC 850; *Koipalli v. Sajja*, 13 IC 315, *Rameshwar v. Ganga*, 1950 A 598 FB.

17 *Kalidas v. Nathu*, 7 Bom 217; *Dost v. Mohandas*, 91 IC 573.

always be made parties to a suit as plaintiffs with the surviving partners.¹⁸ If it be found that the contract was made between the defendant and two of the partners only who were plaintiffs there would be no difficulty in deciding in their favour, because then the joinder of the other partners would only be a misjoinder. In an action on a contract it is the right of the defendant, if he takes the objection in proper time, to insist upon all the persons with whom he contracted as being joined as plaintiffs; and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the persons whose non-joinder has been objected to, and the court finds that the objection is well-founded, the suit must be dismissed.¹⁹ Where brokerage in respect of a contract is due jointly to two brokers, one of them suing to recover his share must sue for the whole amount and join the other broker as a co-plaintiff, but if he refuses, as a defendant, otherwise the suit should be dismissed.²⁰ On the death of a co-promissee who was made a defendant in a suit his legal representative should be brought on the record otherwise the suit should abate.¹ It has been pointed out by the Full Bench of the Allahabad High Court² that upon the death of the obligee of a money bond his heirs cannot sue individually and separately for their respective shares of the money due on the bond for that would be to alter the nature of the contract, the obligation being indivisible. In the dissentient judgment it was pointed out that there was nothing in the Act to show what happened to a single right when the owner of it died and several persons became entitled to it. Whether a contract is joint or several depends primarily on the language used. It is a question of intention to be determined by considering not only the language but also the interest and the relations of the party. If the interest of the party is joint the action must be brought in the name of all of them. If the interest is several the parties may maintain separate actions. In an action on a dower debt the interest of the heirs are several, so that each of them is entitled to bring an action for the recovery of the share of the dower debt, although it is desirable that the other heirs ought to be joined as parties.³ Where the agreement does not specify the shares of the plaintiffs in a suit on the death of one the right to enforce the contract vests in the legal representatives of the deceased along with the survivors.⁴ Where there is a devolution by survivorship, as in the case of coparceners, an executory contract entered into by one coparcener can be enforced against the survivors; if the contract can be shown to be beneficial or necessary⁵ one partner, with whom personally a contract was made, is entitled to sue upon the contract in his own name without joining the copartners

18 *Ram Narain v. Ram Chander*, 18 C 86.

19 *Ramsebuk v. Ramlall*, 6 C 815.

20 *Manghanmal v. Phalajrai*, 105 IC 544; *Nabendra v. Shasab*, 1941 C 596 (suit on hatchitta executed in favour of 3 persons).

1 *Chandu v. Khushali*, 124 IC 684.

2 *Kandhiya Lal v. Chandar*, 7 A 313 FB, fold. in *Ahinsa Bibee v. Abdul*, 25 M 26, 33 sq.

3 *Mahomed v. Akramul*, 12 CWN 84, 90.

4 *Pir Bakhsh v. Kidar*, 155 IC 610.

5 *Neehat v. Kalloor*, 33 IC 696.

as plaintiffs.⁶ Similarly, a cosharer who mortgages his undivided share can alone sue.⁷

It is settled law that a member of a joint family can sue on a contract which he has taken in his own name, especially when it does not purport to have been obtained by him on behalf of any others but himself.⁸ The managing member of a joint Hindu family can sue alone without joining all those interested with him.⁹ The general rule is that where the contract on which the suit is based is in the sole name of the plaintiff, and it does not purport to have been obtained by him on behalf of any other but himself, the plaintiff as the sole promisee can enforce the contract.¹⁰

In a suit to recover a debt due to joint promisees all of them must be parties and the suit must be for the entire debt, even where the joint promisees have divided their claim to recover the debt due to them jointly.¹¹ A single person cannot sue in a firm name, all living joint promisees must join in the suit to enforce a debt due to them.¹² If fresh parties be added by the plaintiff himself,¹³ or by the court under S. 32 of the Civil Procedure Code¹⁴ after the suit has become barred, the whole suit will be dismissed; but the rule does not apply where the promise was not joint but several.¹⁵ Whether in the case of an assignment by one of two surviving copartners to the other, the other can sue the debtors of the firm has given rise to conflicting decisions.¹⁶

Suits by partners.—In case of a partnership all the individuals constituting the partnership are necessary parties to a suit in which a debt due to the partnership is claimed. When there are several partners in a firm, and only one of them files a suit to recover a partnership debt the suit will not be entertained unless and until the other partners are on the record; the rule does not apply however where there has been an assignment of their interests by the other partners to the partner suing or their interests have devolved on him by operation of law.¹⁷ A partner suing is, therefore, to join his co-partners as co-plaintiffs or if they refuse to join as co-plaintiffs to make them defendants.¹⁸ The section has been modified by the provisions of S. 30 of the Civil Procedure Code which enables partners to sue or be sued in the name of the

6 *Agacio v. Forbes*, 14 Moo, PC 160.

7 *Bungsee v. Soodist*, 7 C 739, 746.

8 *Gurushantappa v. Chanmallappa*, 24 B 123; *Hari v. Mahadu*, 20 B 435; *Dayabhai v. Gapalji*, 18 B 141.

9 *Kishan v. Harnarain*, 33 A 272 PC; *Alagappa v. Vellian*, 18 M 53 commented on.

10 *Adaikkalam v. Marimuthu*, 22 M 326.

11 *Silualmuthu v. Muhammad*, 51 MLJ 648.

12 *Vyankatesh v. Velmohomed*, 30 Bom LR 117; *Dular v. Balram*, 1 A 453.

13 *Ramsebuk v. Ramlall*, 6 C 815; *Kalidas v. Nathu*, 7 B 217; *Fatmabai v. Pirbhai*, 21 B 580.

14 *Ram v. Akhil*, 35 C 519 FB; *Imamuddin v. Liladhar*, 14 A 524.

15 *Makamed v. Akramul*, 12 CWN 84.

16 *Imamuddin v. Liladhar*, 14 A 524 (affirmative); *Silualmuthu v. Muhammad*, 51 MLJ 648 (negative).

17 *Mulibai v. Shewaram*, 90 IC 111.

18 *Manghanmal v. Pahlajrai*, 105 IC 544, see ante.

firm, it does not enable one of several cocontractors to sue in his own individual name.¹⁹ It is not necessary to make the legal representatives of a deceased copartner parties to an action for the recovery of a debt by the surviving partners.²⁰ If the suit be brought by the surviving partners jointly with the heirs of the deceased partner a certificate of heirship will be necessary.¹ The rule of law is well established that debts due to trading partnerships stand on a different footing from debts due under ordinary contracts, that when one of the partners in a firm dies the surviving partner can sue for the recovery of debts due to the firm without making the legal representatives of the deceased partner parties to the suit. The section has no application to debts due to trading partnerships.² The opposite view was taken by the High Court of Calcutta,³ but that decision has not been followed in a later case.⁴ If, however, it is sought to fix the liability on the private estate of a deceased partner, apart from his interest in the partnership assets, then the legal representatives must be added.⁵ The representative of a deceased partner may sue to recover the partnership debt by joining in the suit the surviving partners as defendants if they refuse to join as co-plaintiffs.⁶ On the death of one of two co-mortgagees the survivor is entitled to a moiety of the interest and the heir of the deceased mortgagee to the other.⁷ Notwithstanding the provisions of the section, the surviving Buddhist wife or husband can file a suit in respect of a debt due to the partnership without joining the legal representatives of the deceased partner.⁸

Time and place for performance

46. Time for performance of promise where no application is to be made and no time is specified.—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question “what is a reasonable time” is, in each particular case, a question of fact.

The section.—Where no time is stipulated, performance of a contract is to be completed within a time reasonable under the circumstances of the case. In case of unnecessary delay by one party, the other party can put an end

19 *Hari v. Karam*, 8 Lah 1.

20 *Devshi v. Bhaikam Chand*, 29 Bom LR 147; *Motilal v. Ghellabhai*, 17 B 6; *Vaidyanath v. Chinnasami*, 17 M 108.

1 *Ugar Sen v. Lakhmichand*, 32A 638.

2 *Moolchand v. Mulchand*, 4 Lah 142.

3 *Ram v. Chander*, 18 C 86.

4 *Balkissen v. Kanhya*, 17 CLJ 648; see *Mathuradas v. Ebrahim*, 51 B 986.

5 *Mathurdas v. Ebrahim*, 51 B 986.

6 *Aga Gulam v. Sassoon*, 21 B 412, 421.

7 *Kanthu v. Vitiamma*, 25 M 385.

8 *Daw v. Ko*, 121 IC 807.

to the contract by giving notice before terminating it.⁹ When a term is said to begin on a particular day it commences on that day, and if it extends for a year it expires on the midnight of the previous day of the following year.¹⁰ People who agree to marry, not having the means, agree with the implied condition to wait till they have them; the legal expression of which is that their engagement is to marry within a reasonable time and that time does not arrive till their means are sufficient.¹¹ Where two parties entered into an agreement for the purchase and sale of coal for a period of one year and it was stipulated between them that the total quantity indented for during the year shall not exceed, without the seller's consent, the maximum average of 350 tons a month, a notice by the buyer requiring the seller to deliver the whole of the undelivered quantity of the year, namely, 2,648 tons within a week or ten days was held not to be a reasonable notice.¹² Where under a contract the defendant undertook to discharge a debt due by the plaintiff to another, and no time was fixed within which the defendant was to pay off the encumbrance which he undertook to discharge, it was held that he was bound to pay within a reasonable time, his failure to do so within three years was a breach notwithstanding the fact that the creditor had not enforced his claim.¹³ A contract to keep a ship insured is broken by failing to do so by 3 days only.¹⁴ Two months was considered a reasonable time to complete a contract for sale of shares.¹⁵ When an option is given to the promisor as to the time of performance, *e.g.*, when money is repayable,¹⁶ or the price of goods is payable,¹⁷ in 6 or 9 months' time, no suit lies before the credit has expired. "A covenant to pay, without specifying a time for payment, creates either a present liability to pay or at the least a liability to pay on demand. A covenant to pay on or before a certain day creates a liability to pay on the day named with an option of an earlier payment. In the case of a covenant to pay on or after a certain day.....there is similarly an option to pay on the day named, but no liability till after the day is passed, and possibly not even then till demand be made".¹⁸ As between parties, a party in whose favour a cheque is drawn has time until the close of banking hours on the following day to present the cheque.¹⁹ The rule does not

9 *Ford v. Cotesworth*, LR 5 QB 544: (1861-73) All ER Rep 473; *Carlton S. S. Co. v. Castle Mail Packets Co.*, 1898 AC 486; *Rustomji v. Dhairyawan*, 32 Bom LR 798 PC; *Postlethwaite v. Freeland*, 5 AC 599, 608; see *Couvreux v. Shapiro*, 1948 PC 192; *Dau v. Kulwantin*, 1950 N 238; *H. I. Trust v. Haridas Mundra*, AIR 1972 SC 1826.

10 *Sidebotham v. Holland*, (1895) 1 QB 378: (1891-94) All ER Rep 617.

11 *Hall v. Wright*, 29 LJ QB 43, 47: (1843-60) All ER Rep 734.

12 *Bengal Coal Co. v. Homoe Wadia*, 24 B 97.

13 *Dorasinga v. Arunachalam*, 23 M 441; *Subramanian v. Muthia*, 35 M 639; *Ramaswami v. Doraiswamy*, 114 IC 226.

14 *Parry v. G. S. Co.*, 33 LJ QB 41.

15 *Bank of India v. Jamsetji*, 1950 PC 90.

16 *Reed v. Kilburn Co-operative Society*, 44 LJ QB 126: LR 10 QB 264.

17 *Price v. Nixon*, 5 Taunt 338: 128 ER 720.

18 *Tysoe v. The Company*, (1911) 2 Ch 279, 284.

19 *Bodhington v. Schilneker*, 2 LJBK 138, fold, in *Maule v. Brownie*, 7 LJCP 111.

apply as between bankers and customers.²⁰ When an agreement is varied, e.g., instead of repairs a new building of unknown extent and cost is undertaken to be erected by one or other of the parties, the completion of the building cannot be enforced within the time originally stipulated for repairs but must be effected within a reasonable time. Specific performance of the varied agreement can be obtained.¹ There is no such thing as a reasonable time in the abstract. It must always depend upon circumstances which differ in particular places and in particular times of the year. Thus, where on account of a strike the discharge of cargo was delayed, *held*, that it was discharged within a reasonable time as distinguished from ordinary time.² Where money was to be paid on a specific date and no precise date was fixed for the delivery of the receipt, the receipt would have to be delivered within a reasonable time.³ Payment punctually means payment on the day specified.⁴ Where in order to consolidate the debts a mortgagor left a large part of the consideration money with the mortgagee so that he might pay off the creditors, the engagement had to be performed within a reasonable time. If the mortgagor fail to pay off the debts within a reasonable time he is guilty of breach of contract and is not entitled to possession of the property mortgaged to him.⁵ In *Hick v. Raymond*⁶ it has been said, "When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time." The question of what is a reasonable time for the performance of the contract is one to be decided not by general abstract considerations but by the particular circumstances of each case. Where delay in performance is attributable to causes beyond the control of the defendant, and he has acted neither negligently nor unreasonably, he is not liable in damages to the plaintiff on repudiation of the contract by the latter, though he cannot retain the deposit money.⁷ But the promisor would be liable where it was possible for him otherwise, though not personally, to fulfil the contract.⁸ When a party has once exercised its option, e.g., by fixing a date for delivery of goods and the other party has accepted the same, a binding contract arises which cannot be altered without the consent of both sides.⁹ The words 'as soon as possible' mean without any reasonable delay regard being had to the plaintiff's means.¹⁰

Where the purchaser of some property agrees to resell it if a specified amount is paid to him by the vendor before a specified date, the purchaser can

20 *Hara v. Henly*, 30 LJCP 302.

1 *Rustomji v. Dhairyawan*, 32 Bom LR 798 PC; *Spartali v. Benecke*, 19 LJ CP 293; *Thornhill v. Neats*, 8 CB NS 831: 141 ER 1392.

2 *Hick v. Raymond*, 1893 AC 22: (1891-94) All ER Rep 491.

3 *Yarlagada v. Pulligadda*, 103 IC 74.

4 *MacLaine v. Gatty*, (1921) 1 AC 382: (1920) All ER Rep 491.

5 *Collector v. Madari*, 78 IC 738.

6 1893 AC 22.

7 *Mahomed v. Nalam*, 53 IC 125.

8 *Mangoomal v. Hansraj* 8 R 17.

9 *Borrowman v. Free*, 4 QBD 500; *Gath v. Lees*, 146 RR 606 *refd.* to in *Steel Bros. v. Tokersee*, 10 R 372.

10 *Attwood v. Emery*, 26 LJ CP 73.

rescind the option if the amount is not paid by the vendor before the date specified.¹¹

47. Time and place for performance of promise, where time is specified and no application to be made.—When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

The Section.—This section agrees with the previous one in the fact that both contemplate a case where “the promisor has undertaken to perform it (the promise) without application by the promisee” (see also S. 49), but differs from that section by the fact that the time for performance is specified, that being so, the engagement must be performed not within a reasonable time but during the usual hours of business on the day specified. The English law is somewhat different. Thus, where the contract was to deliver goods “in all December”, the vendor could deliver them before midnight on the 31st of December, and if on a prior date he refuses to proceed with the contract, the purchaser, not rescinding, is entitled to recover the difference between the contract price and the price which the goods bear on the last day in December.¹² Where there is a specified time before which the plaintiff agrees to deliver the goods sold, he is bound to tender them without any demand being made by the purchaser, if he fails to do so he cannot complain that he has been damnified by breach of contract. It is the vendor's duty to satisfy himself that the goods covered by the railway receipt had actually arrived before the due date, and if he failed to do so he would not be absolved from an obligation of tendering the delivery order backed by the goods in accordance with his contract.¹³ ‘Shipment’ means to put on board. Where a contract is for shipment of certain goods in February and the bill of lading is dated the 28th February, there is no improper shipment.¹⁴ A promise to keep an offer open “up to Wednesday next” includes Wednesday and expire on the midnight of that day. The context and the subject matter have to be taken into account in determining whether the word “up to” is to be taken as exclusive or inclusive of the day on which it is applied.¹⁵ A delivery of milled rice on the 13th January cannot be held to be a delivery in

11 *Hare v. Nicoll*, (1966)2 WLR 441 CA: (1966)1 All ER 285: (1966)2 QB 130.

12 *Leigh v. Paterson*, 8 Taunt. 540.

13 *Mukunchand v. Nihalchand*, 40 B 517, 527.

14 *Gibbon v. Kundanmal*, 28 IC 196.

15 *Metropolitan Engineering Works v. Debrunner*, 45 C 481.

accordance with a contract to deliver "early in January". The word 'early' means at or near the beginning of a period, the first third of a month.¹⁶ A consumer receiving his electric bill after expiry of the time fixed by the company for the grant of rebate is not entitled to claim a fresh date to be fixed for payment so as to be entitled to the rebate.¹⁷ Where as a result of accounting between the buyer and the seller of goods the buyer by a deed acknowledges his liability to pay the amount found due from him, but this deed is silent as to place where the amount is to be paid, it must be paid where the seller carries on his business.¹⁸

Delivery on a holiday.—It is well settled that in the absence of a statutory provision or trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties by suspending the transaction of private business. The sellers have to establish that they were entitled to perform the contract on the day following the holiday by reason of the existence of a valid usage which may be deemed to have been incorporated in the contract between the parties.¹⁹ According to the custom of Calcutta merchants delivery is to be completed on Saturday if it falls due on Sunday.²⁰

48. Application for performance on certain day to be at proper time and place.—When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question "what is a proper time and place" is, in each particular case, a question of fact.

The section.—The section is distinguished from the previous one by the fact that under S. 47 the promisor undertakes to perform his promise without application by the promisee. This section, on the other hand, contemplates a case where the promise is to be performed on a certain day on demand made by the promisee. In the former case the promisor may perform his promise during the usual hours of business on the day promised for performance; in the latter case, it is for the promisee to make the demand at a proper place and proper time. Where a seller agreed to deduce a good title to the premises sold, in an action by the vendee it was held that in order to constitute a good defence the seller ought to have averred notice to the vendee at which of the three places the vendor would be ready to produce his deeds.¹ Where sellers have the right

¹⁶ *Findlay v. Nurse*, 9 IC 460.

¹⁷ *Lahore Electric Supply Co. v. Devi*, 15 Lah 729.

¹⁸ *Manohar Oil Mills v. Bhawani Din*, AIR 1971 All 326, 327.

¹⁹ *Kashiram v. Hurmundroy*, 32 CLJ 140, see how trade usage may modify a written contract; *Lalchand v. Kersten*, 15 B 338.

²⁰ *Motumal v. Ruttanji*, 24 IC 883.

¹ *Rippinghall v. Lloyd*, 5 B & Ad 740: 110 ER 964.

to select any mill among several as the place where delivery is to be made, in order that the buyers may know when and where they are to take delivery, the sellers must give timely notice to the buyers of the date on which and the place where the sellers have fixed that delivery to be effected.²

49. Place for performance of promise where no application to be made and no place fixed for performance.—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

The section.—This section substitutes a reasonable rule for that of English common law³ and requires reference by the promisor to the promisee for the appointment of a reasonable place for performance. If performance be without application and neither day nor place be fixed, the section would apply and exclude the plaintiff's contention that the debtor must seek out the creditor and pay at his place of business. The Act makes no provision for the place of performance when no time or place is fixed and when there is no provision to perform without application.⁴ In India, therefore, the rule as to the place of performance, whether it be payment or any other mode of performance, is to be determined by the provisions of the section.⁵ The rule of common law regarding liability of a bank to pay the amount only at the branch where it is deposited cannot be applied to transactions with chettiers carrying on business in India or abroad. Where money is deposited in Indian currency at a place in Burma with a moneylender, who is a permanent resident of India, and the depositor too is the resident of India, the debt is recoverable in India.⁶ The common law, however, and not this section seems to have been followed in *Motilal v. Surajmal*,⁷ where it is stated "that where no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payment where the creditor is." Sections 48 and 49 clearly lay down that the mode of performance of a contract is a question of fact in each particular case, which the court should determine. In the case of money kept in fixed deposit in a bank, the place of payment depends on the terms of the

² *Steel Bros. v. Tokersee*, 10 R 372.

³ See S. 48 note.

⁴ *Kedarmal v. Surajmal*, 9 Bom LR 903.

⁵ *Puttappa v. Virabhadrappe*, 7 Bom LR 993; *Bansilal v. Ghulam*, 53 IA 58.

⁶ *Vinatheethal v. Chidambaram*, AIR 1972 Mad 288, 240.

⁷ 30 B 167; see *Dhunjisha v. Fforde*, 11 B 649; *Meghraj v. Johnson*, 31 IC 880; *Srilal v. Anant*, 1949 C 443.

contract. A person is not entitled to insist on the personal attendance of the debtor for the repayment of a loan. The debtor also cannot ask the creditor to see him and take the money.⁸

The rule applies to promises for payment of money as well as to promises for delivery of goods. A contract may not expressly state but indicate by implication where the payment is to be made, *e.g.*, that it is to be paid to a firm and therefore paid where the firm is. The section makes it the duty of the promisor to apply for the appointment of a reasonable place. A promisor cannot better his position under the contract by neglecting to make the application. In this state of conflict of authorities the Privy Council has observed that from the terms of the contract itself or from the necessities of the case, the further obligation of finding the creditor so as to pay him may legitimately be inferred by the court.⁹ These conflicting views have apparently been sought to be reconciled as follows: Where no place is fixed for performance of the promise, it is the duty of the debtor to apply to the creditor to have a reasonable place fixed for the performance of the promise and perform it at such a place. If the debtor fails to apply, the law that would apply would be the English law, namely, that the debtor must find out the creditor.¹⁰ An implication deduced from the intention of the parties as appearing from the contract may override an express provision as to the place of performance.¹¹ The section does not get rid of the inferences to be drawn from (1) the terms of the contract itself or (2) the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. The place of performance is the place where the creditor is residing.¹²

Place of performance of promises.—Where a limited company in London entered into an agreement with a party in New York, there being no express stipulation as to the place of payment for the goods shipped to the defendant, according to the course of business in similar transactions between the parties, it was held that the payment was to be made in England.¹³ Where plaintiffs were to deliver machinery in the Isle of Man and the defendants were to pay for it, the payment was to be received in England.¹⁴ Where bought and sold notes of indigo seeds provided that “the seeds to be delivered at any place in Bengal” and it was added “the place of delivery was to be mentioned hereafter,” it was held by the Privy Council that the choice of place lay with the buyer and

8 *Mehtab v. Dharam*, 1944 N 330; *Galley & Co. v. Dalhi*, 1946 M 300; *Gopiram v. Shankar*, 1950 MB 72.

9 *Soniram v. Tata & Co.*, 54 IA 285, fold in *Ram v. Mohanlal*, 121 IC 668, in *Bhagauti v. Chandrika*, 150 IC 289, expld. in *Nathubhai v. Chhabildas*, 59 B 365.

10 *Champaklal v. Nectar Tea Co.*, 57 B 306; *Tasliman v. Abdul*, 63 C 726; *Annamalai v. Daw*, 163 IC 397; *Ramalinga v. Jaya*, 1941 M 695; *Tuljaram v. Wadhu*, 1933 S 62.

11 *Thompson v. Palmer*, (1893) 2 QB 80; 62 LJ QB 502.

12 *Nathubhai v. Chhabildas*, 59 B 365; *Tasliman v. Abdul*, 63 C 726.

13 *Daval & Co. v. Gans*, (1904) 2 KB 685, but see *Comber v. Leyland*, 1898 AC 524.

14 *Robey & Co. v. Snaefell Mining Co.*, 20 QBD 152.

it was not taken away by the subsequent words. The case resembled the class of contracts contemplated in this section where the promisee had not only the right of naming the place but there was thrown on the promisor the duty of applying to the promisee to appoint a reasonable place.¹⁵ Under a charterparty agreement if an election has to be made as to one of two ports where goods are to be loaded, if the election rests with and is made by the charterer but the owner of the vessel does not load the goods at the port named he is liable for the breach of contract. If the election rests with and is made by the owner, it is final.¹⁶ In the case of *pakka adatia* agency primarily the place of payment is the place where the constituent resides¹⁷ or where all the business is transacted,¹⁸ unless the constituent chooses to give directions as to payment at any other place. Where a lease is silent as to place where rent is to be paid, the place of payment is to be determined with reference to this section.¹⁹

Where money is payable on demand, *e.g.*, on a promissory note and not "without application by the promisee" as stated in the section, and no place is fixed expressly or impliedly for payment, the cause of action does not arise at the place where the creditor resides for, in the absence of any other circumstance, there is no implication to pay him there.²⁰ The words 'on demand' on a promissory note do not in themselves take it out of the terms of the section. The section has no application at all to negotiable instruments.¹ "Where under a contract the seller of goods is required to deliver at the buyer's premises, he fulfils his obligations if he delivers there to a person who apparently has authority to receive them, taking care to see that no unauthorised person receives them. If therefore the goods are received by an apparently respectable person, who has obtained access to the buyer's premises and who signs for the goods in the buyer's absence and misappropriates them, the loss must fall on the buyer and not on the carrier or seller.² Where parties have entered into a contract which, though made in Bombay, is intended to be performed at or near the place where the party to perform it carries on his principal business and keeps his books, if general inspection be sought of those books in an action brought against that party, it should ordinarily, if the defendant requires it, be taken at the place where the defendant keeps his books.³

50. Performance in manner or at time prescribed or sanctioned by promisee.—The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

15 *Grenon v. Lachmi Narain*, 23 IA 119.

16 *Abdul v. Hasanhoy*, 16 B 501.

17 *Kedarmal v. Surajmal*, 33 B 364.

18 *Nandlal v. Kisanlal*, 30 Bom LR 1391.

19 *Society &c. v. Sama*, 1938 M 977.

20 *Raman v. Gopalachari*, 31 M 223.

1 *Jivat v. Lalbhai*, 1942 B 251; see *Srilal v. Anant*, 1940 C 443.

2 *Galbraith v. Block*, (1922) 2 KB 155; (1922) All ER Rep 443.

3 *Kevaldas v. Pestonji*, 5 B 467.

Illustrations

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B* respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A*'s goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.

The section.—The ordinary rule as stated in *Leake on Contracts*⁴ is that “when a contract is due it may be discharged by performance according to the terms”. A party cannot be called upon to perform a contract different from the agreement with him,⁵ unless excused by unavoidable circumstances.⁶ Payment of a debt before it falls due cannot be payment of an existing debt then due but is satisfaction in anticipation of the liability created by the debt.⁷ Any variation from the terms of the contract will discharge the promisor unless the consent of the promisee has been obtained for that particular mode of performance. Thus, where additions and alterations to the construction of a ship were under the terms of the contract to be made in pursuance of a written order but were, in fact, made under verbal communications, the employer was not bound to pay for them.⁸ On the deviation of a ship from the contract route, the exceptions in the bill of lading do not apply.⁹ When the excess over the quantity stipulated is trifling, and the seller does not claim the price thereof, the buyer is not entitled to renounce the contract.¹⁰ A person who covenants to insure in one name is not to insure in another. But a covenant to insure in joint names is performed by insuring only in the name of one.¹¹ In the absence of express terms to the contrary, a debt is to be discharged in the currency of the country in which it was stipulated that payment was to be made.¹² If a subscriber to a Railway Provident Fund requests payment as per

4 8th Ed. p. 633.

5 *Baikunth v. Benode*, 29 CLJ 256.

6 *Thomas v. H. S. S. Co.*, 1915 AC 64.

7 *Richardson v. Harris*, 22 QBD 276.

8 *Russell v. Bendeira*, 32 LJ CP 68; cf. *illust. in Official Assignee, Madras v. Rajam*, 36 M 499.

9 *Frenkel v. Mac. Andrews*, 1929 AC 545; (1929) All ER Rep 260; *Stag Line v. Foscolo*, 1932 AC 328.

10 *Stapilton v. Weil*, (1912) 1 KB 574.

11 *Havens v. Middleton*, 22 LJ Ch 746; 68 ER 1085.

12 *Mayor of Auckland v. Alliance Insce. Co.*, 167 IC 337 PC app. fr. New Zealand; *Ottoman Bank v. Chakarian*, 172 IC 786 PC citing *E. S. Co. v. Prudential Assee. Co.*, 1934 AC 122, 148; *B. H. Proprietary Co. v. Latham*, (1933) 1 Ch 373, 391.

rules of the Fund in sterling and by a Bank draft on a Bank in England, the obligation of the Railway is not discharged by issuing a cheque for the amount due to the subscriber in favour of the Reserve Bank of India with instructions to the Reserve Bank to convert the amount covered by the cheque into sterling and to remit the fund in sterling to the Banker of the subscriber in England. Until the direction of the subscriber is fully complied with the money in the hands of the Reserve Bank does not cease to be provident fund money and is not liable to be attached for the debt of the subscriber.¹³ Under a contract made in England payment of £700 sterling for service in New Zealand is to be in English currency.¹⁴

2. *Illustration (a).*—Payment to an agent who is known by the debtor to have no authority to receive the money does not amount to a payment to the creditor.¹⁵ Money paid to another at the request of the creditor amounts to payment to the creditor.¹⁶

To support a plea of payment it is not necessary to show that cash passed. *Illustration (a)* to section 50 shows that payment may be made by means of transfer entries in books of account.¹⁷

Performance of Reciprocal Promises

51. Promisor not bound to perform unless reciprocal promisee ready and willing to perform.—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) *A and B contract that A shall deliver goods to B to be paid for by B on delivery.*

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) *A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.*

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

1. Reciprocal promises.—Reciprocal promises, or mutual covenants, as they are also called, may be one of three kinds. As Lord Mansfield has said:—

13 *Union of India v. Radha Kissen*, AIR 1969 SC 762.

14 *De Bueger v. Ballantyne*, 1938 AC 452.

15 *Mackenzie Lyall v. Shib Chunder*, 12 BLR 360.

16 *Hamlyn v. Bettleley*, 5 CPD 327.

17 *Narayandas v. Sangli Bank*, AIR 1966 SC 170.

"There are three kinds of covenants: (1) Such as are called mutual and independent—where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour and where it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff; (2) there are covenants which are conditional and dependent—in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed the other party is not liable to an action on his covenant; and (3) there is also a third sort of covenants which are mutual conditions to be performed at the same time and in these, if one party is ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is bound to do the first act".¹⁸

"In the *first* of these three classes each party relies on the promise of the other; neither is entitled to demand antecedent performance, or even to require that the other should be ready and willing to perform his part. In the *second* class one of the parties has the security of performance on the other side before he can be called upon to perform his promise (sec. 54). In the *third* class, which is that dealt with in this section, each party has the security of concurrent performance on the other side; neither is bound to perform his promise, unless the other is at the same time ready and willing to perform his part of the contract.¹⁹ But when one party to the contract announces his intention not to perform his part, the other party is excused performance of his part and is not bound to do a nugatory act".²⁰

Where two covenants in a deed have no relation to each other, i.e., are independent and not mutual, the non-performance of the one cannot be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason amongst others that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other.¹ Thus, where an agreement provides for the payment of a sum of money, and does not make the performance of the thing, which is the consideration for the payment, a condition precedent to or concurrent with the payment, an action may be maintained for the recovery of the sum of money without such performance.² In case of a conditional bargain, unless and until the condition is performed, no liability arises under the contract. Thus, where a person agrees to buy a few shares in a company and is called upon to make a deposit within a certain date and is informed that scrip certificates will be delivered after the execution of the parliamentary contract and subscribers' agreement, *held*, he was not liable as a shareholder until the perform-

18 *Jones v. Barkley*, 2 Doug 684: 99 ER 434.

19 *Sprague v. Booth*, 1909 AC 576; *Pandurang v. Dadabhoy*, 26 B 648.

20 *Cort v. Ambergate Ry.* 20 LJ QB 460, *referred to in* C & S 11 Ed. p. 214.

1 *Thomas v. Cadawallader Willes*, 496, cited in argument in *Christie v. Borelly*, 29 LJ CP 153; *Huntoon v. Kolynos*, (1930) 1 Ch 528.

2 *Matlock v. Kinglake*, 10 A & E 50, relied on in *Workman v. Brazilleno*, (1908) 1 KB 968, 976; *Pordage v. Cole*, 1 Wms. Saund 548, cited in *Dicker v. Jackson*, 17 LJ CP 234.

ance of the condition.³ An agreement to assign certain debentures on payment of a certain sum of money is not a contract consisting of reciprocal promises.⁴ In the case of reciprocal promises to be simultaneously performed each party is to do an act at the same time as the other, *e.g.*, where goods in sale for cash are to be delivered by the vendor and the price is to be paid by the buyer. These are concurrent conditions and neither party can maintain an action for breach of contract without averring that he performed or offered to perform what he himself was bound to do.⁵ "When two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without averring a performance or an offer to perform on his own part, though it is not certain which of them is obliged to do the first act....When it is laid down that performance of a concurrent condition must be averred, the meaning is that the plaintiff must aver in his declaration that he was ready and willing to perform his part of the contract; and this averment will be proved by showing that he called on the defendant to accomplish his. In such cases neither of the parties is bound to do the first act or to perform his part of the agreement before the other". All that is required of the plaintiff to show is that he did everything which he was bound in fact to do.⁶ Where the promise relating to the payment of the price and the promise relating to the delivery of the goods are to be simultaneously performed the promises are in the nature of concurrent conditions.⁷ Thus where defendants engaged the plaintiff to write a treatise for a periodical publication, the plaintiff began to write, but before he completed it, the defendants abandoned the periodical publication, the plaintiff could sue for compensation without tendering or delivering the treatise.⁸ Whenever there is an omission to do an act pursuant to the terms of contract, there is a default in the performance, of it.⁹ 'Cash on delivery' means cash in exchange for and simultaneous with the delivery of goods. If a contract is for delivery "free on board" and "cash on delivery", payment may be required upon delivery of the goods at the time and place mentioned in the contract for delivery.¹⁰ Under a charterparty agreement the delivery of the cargo and the payment of freight are to be concurrent acts. If the plaintiff be ready and willing to deliver but the defendant be not ready and willing to accept the cargo and to pay the freight, the plaintiff can recover damages to the extent of the sum he would have received if the defendant had performed his contract.¹¹ "Where, in a written contract, it appears that both parties have agreed that something shall be done which cannot effectu-

3 *Waterford & C. Ry. Co. v. Pidcock*, 22 LJ Ex 146.

4 *Kaikhushroo v. C. P. Syndicate*, 1950 FC 8; see *Leigh v. Lille*, 30 LJ Ex 25.

5 *Benjamin on Sales*, 6th Ed. p. 638, cited in *Chengravelu v. Akarapu*, 86 IC 299; *Bankart v. Bowers*, LR 1 CP 484.

6 *Imperial Banking & Trading Co. v. Pranjevandas*, 2 BH CR 258.

7 *Chengravelu v. Akarapu*, 86 IC 299.

8 *Planche v. Colburn*, 8 Bing 14: (1824-34) All ER Rep 94.

9 *Williams v. Stern*, 5 QBD 409. See S. 54.

10 *Heilgers & Co. v. Jadub*, 16 C 417.

11 *Stewart v. Rogerson*, LR 6 CP 424.

ally be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing".¹² The law does not take any regard of fractions of a day except in cases of necessity, *e.g.*, which of two acts done on the same day was done at the earlier time of the day.¹³ Where a creditor refuses to carry out his part of the agreement and prevents by his conduct the debtor from carrying out his part by the stipulated date, the debtor cannot be held guilty of a breach of the agreement.¹⁴ Where, however, the performance of the act is prevented by *vis major* there is no breach of the contract by either party.¹⁵ In the case of reciprocal agreements one of them cannot be enforced if the other be void and unenforceable.¹⁶

What is or is not a condition precedent depends not on mere technical words but on the plain intention of the parties to be deduced from the whole instrument. Covenants by both parties to give bonds for the due performance of a contract have been held to be not mutual and dependant. A performance of the condition precedent is a necessary preliminary to a right to recover on the contract.¹⁷ Substantial performance of conditions precedent is enough.¹⁸ Modern decisions incline against the construction of promises as independent of one another.¹⁹ One particular rule well acknowledged is that where a covenant or agreement goes to form part of the consideration and may be compensated in damages, it is an independent covenant or contract, an action might be brought for the breach of it without averring performance.²⁰

2. Readiness and willingness.—A party to a contract, advancing money to the other party on a partial guarantee, is not entitled to recover the money if there has been default on his part but no default on the part of the other party.¹ In a suit under this section it is the duty of the plaintiff to satisfy the court that he was ready and willing to perform his part of the contract, *i.e.*, that he had the capacity or had taken such step as to place himself in a position to perform it.² If the plaintiff cannot establish it the suit will fail.³ Incapacity is full proof of want of readiness.⁴ If a contract contains mutual obligations a party who is unable to perform his part of the contract cannot

12 *Mackay v. Dick*, 6 AC 251, 263.

13 *Clarke v. Bradlaugh*, 8 QBD 63: (1881-85) All ER Rep 1002.

14 *A. Chettyyar v. A. Firm*, 1938 Rang 660.

15 *Ford v. Cotesworth*, LR 5 QB 544, 548: (1861-73) All ER Rep 473.

16 *Manghu v. Nur*, 106 IC 823.

17 *Roberts v. Brett*, 11 HLC 337; *Stavers v. Curling*, 3 Bing NC 355, 368; *Dallman v. King*, 7 LJ CP 6: (1835-42) All ER Rep 411.

18 *Dallman v. King*, 7 LJ CP 6: (1835-42) All ER Rep 411.

19 *Chengravelu v. Akarapu*, 86 IC 299.

20 *Graves v. Legg*, 23 LJ Ex 228: (1874-80) All ER Rep 242, *refd.* to in *Bettini v. Gye*, 1 QBD 183: (1874-80) All ER Rep 242, in *Huntoon v. Kolynos*, (1930) 1 Ch 528: 47 RPC 403.

1 *Golam v. Akhoy*, 82 IC 205.

2 *Shriram v. Mudungopal*, 30 C 865 PC; *Nalam v. Narayanaswami*, 97 IC 986.

3 *Chengravelu v. Akarapu*, 86 IC 199, *Vairavan v. Kannappa*, 86 IC 436.

4 *Lawrence v. Knowles*, 8 LJ CP 210; *Jagannath v. Aaron & Co.*, 1940 E 284.

exact performance from the other party.⁵ Readiness and willingness to carry out his obligation has always been a condition precedent to the plaintiff's right to recover damages in respect of breach of one of two concurrent obligations.⁶ The plaintiff cannot excuse himself by saying that the defendant did not possess the goods, for the defendant could have got the goods from elsewhere.⁷ It is not necessary for the plaintiff to prove that on the due date he had the goods actually in his possession; it is sufficient if he is able to prove that he had control of the requisite goods or that he had the capacity to deliver them when called upon to do so.⁸ In a contract for the sale of shares it is not necessary for the vendor to prove, in order to show that he was ready and willing to perform his part of the agreement, that (1) he was the beneficial owner of the shares; and (2) that the approval of the directors of the company has been obtained. A formal tender is not necessary to be proved in order to entitle a plaintiff to recover under an issue of "ready and willing to deliver"⁹; similarly, the buyer has not to produce the money.¹⁰ In a contract for sale, if the due date for delivery has expired, and the buyer is sued for damages for failure to take delivery, the seller must prove tender and readiness and willingness. He proves readiness and willingness when he establishes that the contract was not completed not because of his fault but because of the fault of his opponent.¹¹ In the case of a contract for the sale of immovable property, if the state of the vendor's title be such that were the purchasers to complete the purchase they would not be able to obtain possession of the property without further litigation with third parties they would be justified in not completing the purchase.¹² If the plaintiff happens to be the buyer he must allege and prove that he was ready and willing to pay for the goods, likewise if the seller be the plaintiff he must allege and prove that he was ready and willing to deliver.¹³ It is not necessary to tender the price, particularly where the seller does not possess the goods.¹⁴ Where a contract gives a party an express option to sue on one occasion or other, he cannot be compelled to sue when the contract authorises him to wait. Where a contract gives the power to elect, it is not within the power of law to say that such election shall not be made.¹⁵

"Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof, B covenants to pay A a sum of money on the same day, neither can maintain an action

5 *Faqir v. Bhagu*, 79 IC 371.

6 *Abdullah v. Tenenbaum*, 149 IC 816, PC app. fr. Palestine.

7 *Nalam v. Narayanaswami*, 97 IC 986.

8 *Kanwar v. Ganpat*, 7 Lah 442; *Ganesh v. Ramnath*, 9 Lah 148, 163.

9 *Imperial Banking & Trading Co. v. Atmaram*, 2 Bom HC 260; as to nature of evidence necessary, see *Maganbhai v. Manchhabhai*, 3 Bom HCR 79; *Jivraj v. Poulton*, 2 Bom HCR 267.

10 *Bank of India v. Jamssetji*, 1950 PC 90.

11 *Arjuna v. Harakehand*, 172 IC 812.

12 *Sharafdin v. Allabux*, 88 IC 569; *Marsden v. Moore*, 4 H & N 500.

13 *Chengravelu v. Akarapu*, 86 IC 299.

14 *Kidar v. Shimbhu*, 8 Lah 198.

15 *Baburam v. Abdhoot*, 41 IC 423.

without showing performance or an offer to perform his part, though it is not certain which of them is obliged to do the first act, this particularly applies to cases of sale." He who was ready and agreed to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part.¹⁶ Where in a case of sale of unascertained goods, F.O.B., the plaintiff was ready and willing to perform his part of the contract, but the defendant failed to name an effective ship so that the goods remained unshipped, the plaintiff was not entitled to recover the price of the goods.¹⁷ If there be a contract to deliver pig iron "25 tons at once and 75 tons in July next", and 75 tons in all were delivered by the end of July, the sellers cannot recover the price of the remaining 25 tons, unless the delivery be withheld in consequence of a request made by the vendee before the expiration of the agreed time.¹⁸ A party who by his own act disables himself from fulfilling his contract makes himself thereby at once liable for a breach of it and dispenses with the necessity of any request, that he will perform it, by the party with whom the contract is made. Thus, where A agrees with B to assign to B his interest in certain premises for a period of 7 years but within that period parts with all his interest in the premises to another person, he puts it out of his power to perform the contract, it is not necessary for B to allege readiness and willingness on his part.¹⁹ In equity also the general rule is that a party who asks the court to enforce an agreement in his favour must aver and prove that he has performed, or been ready and willing to perform, the agreement on his part.²⁰

52. Order of performance of reciprocal promises.—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

Order of performance of reciprocal promises.—Where there was a contract for the sale of railway stock and for the transfer of bonds to be

¹⁶ *Laird v. Pim*, 10 LJ Ex 259: (1835-42) All ER Rep 67.

¹⁷ *Colley v. Overseas Exporters*, (1921) 3 KB 302: (1921) All ER Rep 596; *Mackay v. Dick*, 6 AC 251, Distgd.

¹⁸ *Plevins v. Downing*, 1 CPD 120.

¹⁹ *Lovelock v. Franklin*, 15 LJQB 146; *G. N. Ry. v. Harrison*, 22 LJCP 19.

²⁰ *Walker v. Jeffreys*, 1 Hare 341, 352.

thereafter executed with a stipulation for forfeiture of deposit by the vendor on default, as the buyer did not pay or offer to pay the purchase money and also failed to produce the bonds, the seller was not guilty of any default and was therefore entitled to forfeit the deposit money.¹ A purchaser is not bound to pay the balance of the purchase money till the vendors have put the property in the condition in which it was to be conveyed to him.² But a purchaser may by contract make himself liable to pay the purchase money on a day fixed without a conveyance. A tender of the conveyance need not be averred in such a case.³ The obligations of the parties under a charterparty agreement must be decided by the terms of the charterparty.⁴ In the ordinary case of business, work is not usually paid for before it is done. It is the custom in some cases for payment to be made as the work progresses. A person for whom some work is done is not expected to pay the entire cost in advance without an express agreement to that effect.⁵ When the contract was for the delivery of goods forthwith and the price was to be paid within 14 days of the contract, delivery was meant to precede the payment.⁶ The same rule applies in the case of a contract for the sale of goods "to be paid by cash in one month".⁷ In the case of reciprocal promises, the right to claim performance by a party is dependent on and postponed to what he on his part had promised and in the absence of such performance his claim must fail.⁸ Where shortage was suspected in a consignment and the consignee offered to take delivery on reweighment, to which the railway company agreed, the performance of the contract was based upon reciprocal promises, of which obviously the prior in order of sequence was the promise to weigh or measure. When the company failed to perform this promise the consignee was at liberty to refuse to take delivery.⁹ In a contract for the grant of a lease, certain payments, it was stipulated, were to be made before the lessor was to enter into possession, on default being made by the plaintiff in payment he could not complain of any breach by the other party, the contract as it stood had become impossible of performance.¹⁰ In a contract for the sale of land, the execution of the conveyance is, in ordinary cases, a condition precedent to the right of action for the purchase money.¹¹ If a person be entitled to a commission on sale of a piece of land, and the sale is to take effect on approval of the title by the purchaser's solicitor, he is not entitled to the commission unless he proves that the title was approved or that there was such a title tendered as made it un-

1 *Sprague v. Booth*, 1909 AC 576; *Roberts v. Brett*, 11 HLC 337.

2 *Rasik v. Chandra*, 10 IC 525.

3 *Yates v. Gardiner*, 20 LJ Ex 327.

4 *Turner v. Kilburn & Co.*, 45 CLJ 161, 181, see as to general principles governing such contracts.

5 *Hashman v. Lucknow, I. Trust*, 101 IC 847.

6 *Staunton v. Wood*, 16 QB 638.

7 *Spartali v. Benecke*, 19 LJCP 293.

8 *Edridge v. Sethna*, 38 CWN 145 PC.

9 *E. I. Ry. Co. v. Nadia Coal Co.*, 77 IC 260.

10 *Anant v. Sarup*, 115 IC 793.

11 *Guardians, E. L. Union v. Metropolitan Ry.*, 38 LJ Ex 225.

reasonable to approve it.¹² Where it is not stated at whose option one of two alternatives is to take effect, the rule is that the option is in the party who is to do the first act.¹³

53. Liability of party preventing event on which contract is to take effect.—When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

Liability of party preventing performance.—It is elementary justice that one of the parties to a contract shall not get rid of his responsibilities thereunder by disabling the other contractor from fulfilling his part of the bargain.¹⁴ Where a party is prevented from carrying out his part of the contract, his claim against the other is not one in debt but for damages under this section. On a final repudiation of a contract it may be treated as determined by the other party who can bring a claim for damages under S. 53. But a wrongful repudiation by one party cannot, except by the election of the other party so to treat it, put an end to an obligation.¹⁵

Where a seller was entitled to recover the payment of the price of a machine on condition that it should be tried at a proper place provided by the buyer, but it was thwarted in the attempt to fulfil that condition by the neglect or refusal of the buyer to furnish the means of apply that test, the seller must be taken to have fulfilled the condition.¹⁶ Where plaintiffs undertook to finish a certain work within four months and a half but could not begin for four weeks in consequence of the defendants not being able to give them possession, and were afterwards delayed by one week by the default of their own workmen and were out of time by five weeks in finishing the work, they were entitled to the stipulated sum without any deduction for delay.¹⁷ Money paid or ornaments given for the benefit of the bride or bridegroom, or of both, can be recovered by suit, if the marriage contract is broken. A betrothal is a contract,

¹² *Clack v. Wood*, 9 QBD 276; *Sharafdin v. Allahbux*, 88 IC 560.

¹³ *Reed v. K. C. Society*, LR 10 QB 264.

¹⁴ *Measures v. Measures*, (1910)2 Ch 248, 258.

¹⁵ *Edridge v. Seihna*, 58 B 101 PC.

¹⁶ *Mackay v. Dick*, 6 AC 251.

¹⁷ *Holme v. Guppy*, 3 M & W 387.

when it becomes void parties are entitled to the return of the gifts made by them.¹⁸

No person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; he cannot be allowed to sue for a breach of contract occasioned by his own breach of contract.¹⁹ It is sufficient if the contract cannot be performed in the manner stipulated though it may be performed in some other manner not very different.²⁰ If the delivery of goods be delayed because of the interference of the employer the penalties provided for in the contract for such delay are not recoverable.¹ But a party is not exonerated if there be a stipulation to complete the work within the time originally limited even though additional work be ordered.² So if a charterer has agreed to load or unload within a fixed period of time, he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by the exception in the charter-party or arise through the fault of the shipowner or of those for whom he is responsible.³ Where the defendant sold his news agency business to the plaintiff company, the price ultimately to be paid was contingent upon the profit of the business, there was an implied covenant on the part of the company that they would so conduct the business that the real purchase money might be ascertained. If the plaintiff breaks this implied covenant he is not entitled to restrain the other party from breaking his part of the agreement.⁴ Where a company agreed to employ the plaintiffs as agents for seven years, the company could not terminate the agency by ceasing to carry on its business.⁴ Where A had promised to marry B within a reasonable time next after he should be thereunto requested to do so, and A married another, "two sequences follow: first, he thereby dispenses with the condition precedent of a request on her part; since it would be of no use to make such a request to a person already married; secondly, he breaks the contract he has entered into with the plaintiff for he makes himself unable to fulfil it".⁵ That the plaintiff was under an agreement to marry another person is no answer to a suit for breach of promise to marry.⁷ The fact that the plaintiff is with child by another person will excuse a breach.⁸

54. Effect of default as to that promise which should be first performed in contract consisting of reciprocal promises.—

18 *Dholidas v. Fulchand*, 26 B 658, 662, see cases cited; *Rajendra v. Roshan*, 1950 A 592.

19 *Roberts v. Bury Commissioners*, LR 5 CP 310; *Budgett v. Binnington*, (1891) 1 QB 35; *Narsing v. Narayan*, 80 IC 949; *Lovelock v. Franklin*, 15 LJQB 146.

20 *Panama & S. P. Telegraph Co. v. India Rubber & Co.*, LR 10 Ch 515, 532.

1 *Russell v. Bandeira*, 32 LJCP 68.

2 *Doad v. Churton*, (1897) 1 QB 562.

3 *Alexander v. Aktieselskabet &c.*, 1920 AC 88, 94: (1918-19) All ER Rep 986.

4 *Telegraph Despatch Co. v. Mc. Lean*, LR 8 Ch 658.

5 *Reigate v. Union Mfg. Co.*, (1918-19) All ER Rep 143: (1918) 1 KB 592, 605; see *Turner v. Goldsmith*, (1891) 1 QB 544: (1891-94) All ER Rep 384.

6 *Short v. Stone*, 15 LJQB 143.

7 *Beechey v. Brown*, 29 LJQB 104.

8 *Irving v. Greenwood*, 1 Car & P 350.

When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

(a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contract with B to execute certain builder's work for fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed and A must make compensation.

The section.—S. 39 deals with the general effect of refusal to perform a promise. This section deals with the special case of refusal or default where the contract consists of reciprocal promises and there has been non-performance by one of the parties. The section provides for the second of the three classes of cases mentioned by Lord Mansfield.⁹ In this class of cases the promises are so related to one another that performance on one side is a condition precedent to a claim for performance on the other. In cases of reciprocal promises of this character the plaintiff cannot insist on the defendant's performance of his promise without himself performing what he has undertaken to do,¹⁰ though the option to perform his part of the contract is always available to the defendant. Where a mortgagor promised to maintain the mortgagee in possession for 15 years, provided the latter made payments punctually to a decreeholder of the former, on the mortgagee failing to perform the obligation he had undertaken, the mortgagor was entitled to rescind the contract and forthwith to redeem.¹¹ The general rule is "if one of two contracting parties causes the other to commit a breach of one of the conditions of their contract,

⁹ See S. 51 note.

¹⁰ *Vairavan v. Kannappa*, 86 IC 436.

¹¹ *Sauwaley v. Sheo Sarup*, 2 Luck 279; 98 IC 770; see *Chhotku v. Baldeo*, 84 A 659.

the party at fault cannot profit by his own default and exact the penalty of the breach".¹² A non-performance of a condition precedent by one party may be a bar to his proceeding against the other.¹³ Where the plaintiff contracted to sell his entire stock of coal at Shalimar, say, 700 or 800 tons, and delivered only 469 tons, there was a breach of contract. The words 700 or 800 tons were words of description and thus formed an integral part of the contract.¹⁴ If a vendor has been fully informed of the purpose for which the purchaser has bought an article from him, the former must be taken to have impliedly warranted that the article was reasonably fit for the purpose.¹⁵ The same rule of warranty applies to the case of goods supplied in the course of a contract to do work and labour.¹⁶ Where a contract was made to send certain goods by a vessel "after completion of two country voyages", the defendant was held entitled to refuse to ship the goods when it appeared that the vessel had been sent on one country voyage only.¹⁷ The principle relied on was that laid down in *Bowes v. Shand*.¹⁸ "This is a mercantile contract and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance". In face of this section there is no room for the application of the English equitable doctrine that "a contract for the sale of real property makes the purchaser the owner in equity of the estate".¹⁹ But it has been pointed out that in a contract for the sale of land the passing of title is independent of the payment of the consideration money, the parties therefore cannot invoke the aid of this section.²⁰

A tender of goods of some other brand would not be a strict compliance with the terms of a contract such as the other party would be bound to take up.¹ If the description of the article tendered is different in any respect from that contracted to be supplied, the other party is not bound to take it.² Apart from "microscopic" deviations, goods supplied under a contract must answer the description of them in the contract; if they do not so answer the buyer may refuse to accept them.³ In *Re Andrew Yule & Co.*⁴ the question arose whether the goods sold and delivered were other than the goods described in the contract by reason of their peculiar smell. Of course the buyer is not to take advantage of a negligible variation.⁵ There has been a growing strictness

12 *Puliyadi v. Kuttuva*, 42 IC 509; *Arjun v. Tulsi*, 1949 C 510.

13 *Mathra v. Secretary of State*, 133 IC 442.

14 *Kallyanjee v. Shorrocks*, 37 C 334.

15 *Bombay Burmah Trading Corp. v. Aga Mahomed*, 34 M 453 PC; *Manchester Liners v. Rea*, 91 LJKB 504; (1922) All ER Rep 605; *Francia v. Cockrell*, LR 5 QB 501.

16 *Meyers v. B. C. Service*, (1934) 1 KB 46.

17 *Fleming v. Kogler*, 4 C 237.

18 2 AC 455; *Srilakshna v. Dhani*, 1934 S. 29.

19 *Mian Pir v. Sardar*, 60 CLJ 370 PC.

20 *Rath v. Naik*, 1949 Ori 14.

1 *Bendit v. Prudhomme*, 48 MLJ 374.

2 *Muthu v. Alagappa*, 97 IC 866.

3 *Arcos Ltd. v. Ronaasen*, 1933 AC 470.

4 59 C 928.

5 *Jackson v. Rotax Motor Co.*, (1910) 2 KB 937, 945.

in the matter of regarding the particulars in the contract as part of the description of the goods.⁶ When a purchaser of goods has taken delivery without any objection to the quality of the goods, the sale being by sample, and has exercised acts of possession over them, he cannot sue for the return of the purchase money on the ground of unsoundness of goods, but he can claim damages. A vendor is liable in damages for latent defects in the goods.⁷ From the fact that some of the goods tendered were not of the contract description no inference can be drawn regarding the whole of the goods tendered.⁸ Where a person entered into a contract with a railway company for the supply of sleepers of a certain specification, and then negotiated with a firm for the supply of such sleepers as would enable him to carry out the contract with the railway company, the firm being informed of the purpose for which the sleepers were wanted must be taken to have impliedly warranted that those supplied by it were reasonably fit for use by the railway company.⁹ Where a contract is entered into for the purchase of certain bales of cloth bearing certain numbers, the numbers do not give any indication of the quality or description, so for a mere clerical error in the numbers in the contract the purchaser is not entitled to reject the goods on the ground that the goods tendered are not of the contract quality.¹⁰ Where on a conveyance of property it was agreed that the defendant would pay a certain sum on account of arrears of rent to the plaintiff under as per account to be made out by the plaintiff and would have a deed of assignment in his favour in respect of such arrears executed by the plaintiff, the plaintiff was not entitled to sue the defendant purchaser, as the plaintiff did not have the account taken nor the deed of assignment executed.¹¹ Where a contract for the sale of goods contained the clause "F. O. B. New York", the stipulation was regarded as one which went to the root of the contract, which must be performed before the plaintiff could claim indemnity from the defendant. Shipment at Montreal was not in performance of contract.¹² Where a person offered a guarantee and to make a deposit of title deeds if £1000 were advanced instantly for 7 days, and not otherwise, to his brother, he was not liable on the guarantee if the condition was not fulfilled.¹³ Where a master took an apprentice, undertaking to teach him three trades but he ceased to carry on one of them, he by his act made it impossible to teach, therefore, the apprentice was not bound to serve him.¹⁴

Failure to perform means such conduct as amounts to a renunciation, i.e., to an absolute refusal to perform the contract so that the other party may

6 *Re Moore*, (1921)2 KB 519.

7 *Jatindra v. Muralidhar*, 43 CLJ 126; see *Empire Engineering Co. v. Municipal Board, Bareilly*, 27 ALJ 674.

8 *Rayulu v. Kuppu*, 49 MLJ 1.

9 *Bombay Burmah Trading Co. v. Aga Mahomed*, 13 Bom LR 813 PC.

10 *Ramjivan v. Bhikaji*, 26 Bom LR 442 PC; but see *Harichand v. Goshu Kaisha*, 26 Bom LR 921.

11 *Satya v. Mahadeo*, 123 IC 794.

12 *Dayton v. Rohomatollah*, 29 CWN 422.

13 *Burton v. Gray*, LR 8 Ch 932.

14 *Allen v. Topp*, 20 LJ Ex 241.

accept it as a reason for not performing his part. Thus, failure to pay according to stipulation a proportionate price of goods delivered has been held, where the contract was single and indivisible, not to amount to a renunciation.¹⁵

By a contract made in England buyers agreed to buy from sellers a quantity of Portuguese turpentine f.a.s. buyers' ship at Lisbon, the destination being to the sellers' knowledge a port in Eastern Germany. Under the Portuguese law turpentine could not be exported without an export licence. The sellers applied unsuccessfully to the appropriate Government board for a licence to export to the desired port, so that the turpentine could not be delivered f.a.s. the ship chartered for that port sent by the buyers. It was for the sellers to do their best to obtain the licence for East Germany through the suppliers and, if they could not do so, further performance of the contract by the buyers was excused.¹⁶

By a contract embodying four transactions dated September 16, 1953, sellers carrying on business in Finland sold to an English company a quantity of ants' eggs, f.o.b. Helsinki, "Delivery: prompt, as soon as export licence granted". The sellers' application for an export licence, which they had made with reasonable diligence, was refused by the Finnish authorities, so that they were unable to ship and deliver the contract goods. It was held that, on the construction of the contract and in the circumstances of the case, there was to be implied into the clause "Delivery: prompt, as soon as export licence granted" an absolute warranty by the sellers that they obtain an export licence, and not merely a warranty that they would use all due diligence to do so. Accordingly, since they had failed to carry out that obligation, the sellers were liable in damages to the buyers.¹⁷

Warranty or condition.—A condition and a warranty are alike obligations under a contract, a breach of which entitles the other contracting party to damages. But in the case of a breach of condition he has the option of another and a higher remedy, namely, that of treating the contract as repudiated. A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But such obligations are not all of equal importance. There are some conditions which go directly to the substance of the contract, others (warranties) are not so vital. The breach of a condition gives a purchaser the choice of two remedies, either of rejecting the goods and treating the contract as repudiated, or of suing for damages for delivery of the inferior article. A contract for the delivery of common English sanfoin is not performed by the delivery of giant sanfoin, an article of inferior value.¹⁸ Where according to the terms of a contract to sell and purchase ore the parties consider the quality of the ore to be supplied as one of the essential conditions of the contract, the condition that the samples

15 *Simson v. Virayya*, 9 M 359.

16 *A. V. Pound & Co. Ltd. v. M. W. Hardy & Co. Inc.*, (1956) 2 WLR 683 HL.

17 *Peter Cassidy Seed Co. Ltd. v. Osuustukkukauppa I. L.*, (1957) 1 WLR 273, 278-9; (1957) 1 All ER 484; (1957) 1 Lloyd's Rep 25.

18 *Wallis v. Pratt*, (1910) 2 KB 1003, 1012-14, on app 1911 AC 394, fold in *Andrews Bros. v. Singer & Co.*, (1934) 1 KB 17; (1933) All ER Rep 479.

of the ore should be analysed by the nominees of both the parties is also an essential condition; and the seller will be guilty of violating that condition if, on the refusal of the buyer's nominee to analyse, the seller intimates that the analysis by the seller's nominee shall be final with the result that buyer can refuse to buy without being liable for breach of contract.¹⁹ But on a sale of specific goods, with a warranty that they correspond to sample, the vendee cannot refuse to receive them on account of their not corresponding, without an express condition to that effect, but has his remedy in damages or can plead breach of warranty in reduction of damages in an action for the price.²⁰ A promise in a contract, *e.g.*, to deliver a new car, is not affected by a condition in the contract excluding liability for a breach of warranty. An express term excludes the operation of an implied term.¹

55. Effect of failure to perform at fixed time in contract in which time is essential.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

1. **Time of the essence of the contract.**—The rule of equity, which is now the general rule of English jurisprudence, is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. The same principle is formulated in this section. Even where time is not of the essence of the contract, the court may infer that in the circumstances of the case it has to be performed within a reasonable

19. *M. P. Industries v. Shriram Durga Prasad*, AIR 1971 SC 1983.

20. *Dawson v. Collis*, 20 LJCP 116; *Heyworth v. Hutchinson*, LR 2 QB 447.

1. *Andrews Bros v. Singer & Co.*, (1934)1 KB 17, but see *L' Estrange v. Graucob*, (1934)2 KB 394.

time or even with the utmost diligence.² Whether time is of the essence of the contract or not depends upon the nature of the property, upon the construction of the contract, and upon the objects which the parties had in entering into it.³ The mere fact that time is specified for the performance of a certain act is not by itself sufficient to prove that time is of the essence of the contract.⁴ Time has been held to be of the essence of the contract because the amount due was carrying interest.⁵ The first part of the section includes both the case of time originally being made of the essence and the case of time becoming of the essence having regard to what subsequently takes place under the contract. In *Jamshed v. Burjorji*⁶ it has been laid down that the rule embodied in this section does not vary from the English rule. If time has not been originally of the essence of the contract and one party has been guilty of unreasonable delay, the other party is not justified in serving a notice making time of the essence of the contract.⁷ That depends upon the intention of the parties to be deduced from all the surrounding circumstances of the case.⁸ The section does not enable a promisee to keep alive a broken contract in the hope of being able to recover heavier damages for its breach.⁹ The Transfer of Property Act and this Act have to be read together and under the first paragraph of the section where time is of the essence of a contract, a lessee has the power to rescind a contract of lease if possession is not delivered to him on the stipulated date.¹⁰ But a breach of contract may be incapable of remedy, i.e., under S. 114 A (b), T. P. Act, if time is of the essence of the contract.¹¹ The object of the section is to protect the promisee and is analogous to S. 39. If a stipulation entered into by the promisor as to time, which is of the essence of the contract, is broken the promisee is entitled to repudiate, or put an end to, or avoid the contract.¹² It is the duty of the promisor to take all steps necessary for the performance of the contract within the stipulated time.¹³

In equity the time fixed for completion of the sale or purchase of real estate is not of the essence of the contract, but this rule never had any application to cases in which this stipulation as to time could not be disregarded without injustice of the parties.¹⁴ In a contract for sale of land, a provision for the

2 *Kishan v. Purnendu*, 15 CLJ 40; *Kanu v. Gonda*, 1947 L. 352.

3 *Patrick v. Milner*, 2 CPD 342; see *Fakir v. Abdulla*, 12 B 658, 678; see *Seton v. Slade*, Wh. & TLC 445: (1775-1802) All ER Rep 163; *Hipwell v. Knight*, 4 LJ Ex Eq 52: 160 ER 163.

4 *Raghubir v. Sundar*, 131 IC 371.

5 *Sankal v. Joitram*, 1949 B 193.

6 43 IA 26.

7 *Teju v. Gangji*, 57 B 292.

8 *Mohammad v. Hamida*, 1945 A 70.

9 *Gopalan v. Dist Board, Malabar*, 145 IC 476.

10 *Rajpat v. Municipal Committee, Arvi*, 110 IC 420.

11 *Provat v. B. C. Bank*, (1938)2 Cal 434, see when time is of the essence of the contract.

12 *Mutthaya v. Lekku*, 37 M 412.

13 *Covureur v. Shapiro*, 1948 PC 192.

14 *Stickney v. Keeble*, 1915 AC 386, 415: (1914-15) All ER Rep 73; *Tilley v. Thomas*, LR 3 Ch 61, 67; *Jamshed v. Burjorji*, 43 IA 26, fold in *Sadiq Hussain v. Anup*, 4 Lah 327, 332; *Saukhi v. Mahamaya*, 1934 P 518.

payment of interest in case of delay in the payment of the balance of purchase money shows that time is not of the essence of the contract.¹⁵

When it is alleged that time is of the essence of the contract, it is meant that the particular time mentioned for completion is the predominant constituent element of the contract without which it would not be what it is, and that if the time be allowed to pass without the contract being completed it is fair and reasonable to consider that the promisor had definitely and finally refused or rendered it impossible to carry out the contract. It is one of the well known principles of equity that in cases of sale of immovable property time is not of the essence of the contract, unless it be quite clear that the parties especially agreed that it should be so. Where time is really of the essence of the contract failure to complete by the specified time gives the right to the promisee immediately to rescind. Where it is not of the essence of the contract he has a right to damages only and a delay of a few days would not render the contract voidable, but the contract must be performed within a reasonable time.¹⁶ In *Webb v. Hughes*¹⁷ it has been observed that "if time be made the essence of the contract that may be waived by the conduct of the purchaser, and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract." But "a mere extension of time and nothing more is only a waiver to the extent of substituting the extended time for the original time and not an utter destruction of the essential character of time".¹⁸ In English law in mercantile contracts time is of the essence of the contract and the same rule holds good in India.¹⁹ When both parties are engaged in business and articles are brought by one party from the other for business purposes, the transaction falls within the term 'mercantile business'.²⁰ Where a person is given an option to purchase certain shares and separate times are fixed for election to purchase and for payment of price, both the times are of the essence of the contract.¹ "In cases other than commercial contracts the ordinary presumption is that time is not of the essence of the contract. But the presumption is rebuttable. Time may be of the essence of the contract by reason of an express condition, or such condition may be inferred from the circumstances and intention of the parties.² Upon the sale of a business (public house) as a going concern, time is of the essence of the contract.³ In case of a provision in a compromise decree that in default of payment within a time fixed, a certain consequence will

15 *Patrick v. Millner*, 2 CPD 342; *Hatten v. Russell*, 38 Ch 334.

16 *Doulatram v. Alibhai*, 33 IC 668; *Begraj v. Alishar*, 77 IC 897.

17 LR 10 Eq 281, fold in *Kishan v. Purnendu*, 15 CLJ 40; see *Bruner v. Moore*, (1904)1 Ch 305; see *Sankuni v. E. I. Assce.*, 1932 M 241.

18 *Barclay v. Messenger*, 43 LJ Ch 449, 456; *Kamal v. Chhatoorbhuj*, 78 IC 962; *Lucknow Automobiles v. R. Parts*, 1940 O. 443.

19 *Tirkamji v. Port Trust, Karachi*, 36 IC 96; *Kuppusami v. Doraisami*, 4 IC 1125; *Kruger & Co. v. Po*, 8 IC 945; *Mohanlal v. Gyaniram*, 155 IC 778; see *Smith v. Damodar*, 17 B 129—goods to be shipped within or during a certain time.

20 *Lucknow Automobiles v. R. Parts*, 1940 O. 443.

1 *Hari v. Nicoll*, (1966)1 All ER 285 CA.

2 *Jadu v. Chandra*, 36 CWN 285; *Halsbury*, 4th ed., Vol. 9, Para 481.

3 *Tadcaster Brewery v. Wilson*, (1897)1 Ch 705, 711.

follow, the provision as to time is of the essence of the contract.⁴ So also where under a compromise one party undertakes to deposit the money in court within a certain time.⁵ Premiums on a life policy if not paid within the date stipulated become voidable.⁶ Where the defendant entered into a contract with the plaintiff to deliver 50 tons of rice in June and another 50 tons in July and it was provided that no objection was to be raised by the plaintiff in case of delivery being delayed, but there was late delivery, *held, prima facie* there was a breach of the contract, the burden of proving that the case came within the exception lay upon the defendant.⁷ The term "shipment" included not merely the loading of the goods on board the ship but also the starting of the ship. It was obligatory upon the defendant to establish that the delay was attributable to circumstances for which he was not responsible.⁸ When there is a stipulation in a mercantile contract that goods are to be shipped within or during a certain time specified in the contract, it is a condition precedent that the goods shall be so shipped, the time of shipment forming part of the description of the goods. The expressions 'to be shipped' and 'shipment' within a certain time mean that the goods shall be placed on board the ship during the time specified, in the absence of trade usage to the contrary.⁹ As soon as the contract was broken the obligation of the purchaser to take delivery of the goods vanished.¹⁰ He was not bound to accept the goods when they were delivered late.¹¹ Similarly a stipulation to discharge the cargo within a fixed period of time is an unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent the charterer from performing it.¹²

If a plaintiff cannot complete the performance of an act within the stipulated time the defendant is entitled to rescind the contract;¹³ to allow the plaintiff further time for performance would amount to making a new contract.¹⁴ The plaintiff, if he treats the contract as cancelled, may, on giving notice to the defendant, dispose of the goods after a reasonable length of time and remit the proceeds to the defendant.¹⁵ But if the plaintiff accepts performance after the stipulated time he is deemed to have waived the objection.¹⁶ Thus where an indent contains a clause that unless the buyer exercises his option within three days the contract will be understood to be rescinded, it is his duty to reply

4 *Ellammal v. Venkata*, 79 IC 958; *Bhagwat v. Srinivas*, 16 Pat 202 FB; *Kissen v. Madan*, 16 Pat 395; but see *Nandrani v. Durga*, 82 IC 505.

5 *Beni v. Sew*, 1949 C 661.

6 *Sankumi v. E. L. J. Insee*, 1932 M 241.

7 See *Sandeman v. T. B. S. S. Co.*, 1913 AC 680, 689: (1911-13) All ER Rep 1013.

8 See *Dunn v. Bucknall*, (1902) 2 KB 614, 621: (1900-03) All ER Rep 131.

9 *Cursetji v. Crowder*, 8 B 299.

10 See *Behn v. Burness*, 3 B & S 751, 753.

11 *Kali v. Ismail*, 20 CWN 159.

12 *Dattobhoy v. Goolam*, 7 Bom LR 670; *Postlethwaite v. Freeland*, 5 AC 599, 608: 49 LJ QB 630.

13 *Buddree v. Ralli*, 6 C 678.

14 *Couvreux v. Shapiro*, 1948 PC 192.

15 *Baijnath v. Johar*, 31 ALJ 1000.

16 *Parbhu v. Raghunath*, 42 IC 408.

within that time or automatically the contract is cancelled.¹⁷ The due date of performance of a contract is the date which was in the contemplation of the parties at the time when the contract was entered into and not the date to which, owing to circumstances beyond the control of the parties, the actual performance had necessarily to be postponed but without any express agreement between the parties.¹⁸ The section has been applied to time mentioned in consent decrees.¹⁹

2. **Intention essential.**—Under the section the question, whether or not time is of the essence of the contract, depends upon the intention of the parties. This intention is to be ascertained, (1) from the express stipulation of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances. Where there is nothing in the surrounding circumstances from which such an intention can be inferred, the fact that the contract is for the sale of land does not import such an intention.²⁰ The test is whether at the inception of the contract its performance by one party was meant to depend upon the other party's promise being fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time. If the former is found to have been the intention no relief can be claimed against forfeiture; if the latter is found to have been the intention equity will not refuse relief.¹ When the time fixed for the performance of the contract was extended twice and the object of the purchase is not a commercial undertaking time is not of the essence of the contract.² It is well settled that the mere fact that a date has been mentioned for the performance of the agreement does not conclusively prove that time was intended to be of the essence of the contract. The court has to determine whether, from an express promise to that effect, or because such a promise is to be implied from a consideration of the real intention of the parties, inferred from the nature of the contract, time is to be deemed of the essence of the contract.³ Where under a contract for the sale of iron joists and other articles the seller is required to supply the goods within ten days or earlier, the intention of the parties is to make time the essence of the contract. If the seller instead of supplying the goods within the stipulated time supplies diverse quantities on different dates and they are accepted by the buyer, it cannot be said that the buyer is not entitled to put an end to the contract as to the outstanding quantity on the ground of delay, especially when he serves a notice to that effect on the seller.⁴ Is it necessary that in order that time may be of the essence of the contract

17 See *Mansaram v. Mangal*, 65 IC 497.

18 *Pragdas v. Munnial*, 105 IC 906, foling *Ganeshilal v. Debi*, 105 IC 265.

19 *Bhagvant v. Appaji*, 18 Bom LR 803; *Parbhu v. Jhalo*, 42 IC 480; *Shankar v. Ratanji*, 47 Bom 607.

20 *Alliboy v. Dowlatram*, 50 IC 41; *Shambhu v. S. of S.* 1940 S 1. Intention of the parties was held to be that time should be of the essence of the contract in *Delhi Cloth Mills v. Kanhiya*, 19 IC 93 (mercantile etc.).

1 *Harakh v. Saheb*, 6 CLJ 176.

2 *Devendra v. Sonubal*, AIR 1971 Mys 217.

3 *Mahadeo v. Narain*, 24 CWN 330; *Kuppusami v. Doraisami*, 4 IC 1125.

4 *C. C. of India v. S. S. Corporation*, AIR 1970 Cal 321, 323-24; *Deero-Wall International S. A. v. Practitioners in Marketing Ltd.*, (1971)2 AN ER 216 CA.

the intention must be expressed in unmistakable language?⁵ Subsequent conduct of the parties is not relevant to find out whether time was of the essence of the contract.⁶ The intention of the parties to make time of the essence of a contract may be manifested by express stipulations between the parties or impliedly from the nature of the property or the surrounding circumstances of the case.⁷ Specific performance of a contract will be granted in spite of failure to keep the dates assigned by it if justice can be done by the parties and if nothing in (a) the expressed stipulation of the parties, (b) the nature of the property, and (c) the surrounding circumstances, make it inequitable to grant the relief.⁸ If an agreement shows that the execution of a contract may, for some causes, be postponed, it is evidently contemplated that the time may extend beyond the day fixed for completion; the time fixed therefore cannot be of the essence of the contract.⁹ If a person concedes something to another on the ground of the latter performing his part of the contract within a specified period, time is of the essence of the contract.¹⁰ The parties notwithstanding they named a specific date for performance may really intend no more than that it should take place within a reasonable time.¹¹ Where parties agreed that if the decretal amount with compensation was deposited within a certain date the sale would be set aside and in case of default the sale would be confirmed, time was held to be of the essence of the contract, and as there was delay in making the deposit, the sale was held to be confirmed.¹² Where in case of contract with the Government to deliver goods on certain date, the condition of contract itself provides for extension of time, then time is not of the essence of the contract. The contract would not become voidable if the goods are not delivered on the specified date. The Government can ask for compensation in terms of the conditions of the contract and at the same time allow the contract to be performed.¹³

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.¹⁴

5 *Ram v. Kasi*, 1950 C 582: 54 CWN 680.

6 *Madan v. Jawala*, 1950 EP 278.

7 *Roberts v. Berry*, 3 DGM&G 284; see *Jamshed v. Burjorji*, 43 IA 26; *Hudson v. Temple* 29 Beav 536; *Bhal v. Mahadeo*, 1947 N 193.

8 *Arun v. Tulsi*, 1949 C 510; *Debendra v. Sakhilal*, 1950 C 526.

9 *Webb v. Hughes*, LR 10 Eq 281.

10 *Kishen Prasad v. Kunj Behari*, 9 IC 790.

11 *Abdulah v. Gokuldas*, 97 IC 269.

12 *Bhagwat v. Srinivas*, 16 Pat 702 FB.

13 *Anand Construction v. State*, AIR 1973 Cal 550.

14 *G. Pillai v. Palaniswami*, AIR 1967 SC 868, 870, 871 relying on *Jamshed Kodaram Irani v. Burjorji Dhunjibhai*, AIR 1915 PC 83; *Pakharsingh v. Kishansingh*, AIR 1974 Raj 112.

3. **Lease of land.**—In contracts for the lease of working mines time, though not mentioned for the completion of the contract, is from the fluctuating nature of the property considered as of the essence of the contract, the intended lessee may therefore fix a reasonable time for completion and on the lessor's default may rescind the contract.¹⁵ In case of a lease renewable at the option of the lessee, the option should be exercised during the continuance of the lease. Time therefore is of the essence of the contract.¹⁶ A lessee failing to exercise the option to renew within the time limited by the clause giving the option is not entitled to renew. Where, however, no time is fixed for the purpose, an application for the renewal of the lease may be made within a reasonable time before the expiry of the term. A delay on the part of the lessee to apply for renewal through negligence will not entitle him to claim renewal.¹⁷ In view of the intention and conduct of the parties, time may be regarded as of the essence of the contract regarding the execution of a document (*patta*).¹⁸

4. **Sale of land.**—Time is not ordinarily of the essence of a contract for the sale of land simply because a period of time for completion is mentioned, but the parties can make it so by express agreement in the contract itself or subsequently by giving reasonable notice to complete on a day certain, or if the nature of the property intended to be sold requires it.¹⁹ In a contract relating to sale of immovable property the presumption is that time is not of the essence of the contract. Mere incorporation of a clause imposing penalty in case of default does not make time of the essence of the contract.²⁰ Where a vendor of property fails to make out a marketable title he is not entitled to enforce a provision in the nature of a penalty against the purchaser for failure to complete the purchase within the stipulated time.¹ In the case of a mortgage with possession providing for redemption only at a particular season of the year, time is of the essence of the contract and the mortgagor, in order to maintain a suit for redemption, has to show that he made an offer to redeem in that season and that the offer was refused.² In contracts for the sale of land, a clause for forfeiture is very often provided in default of punctual payment as also liberty to cancel the agreement. Where time is of the essence of the contract, the purchaser, if he makes default in payment, is not deemed entitled to sue for specific performance, but relief can be obtained against the forfeiture clause which is of the nature of a penalty. But if the default is of the seller, the buyer is entitled to refund of the earnest money.³ In a contract for the sale of land, the condition that the purchaser should send his objection,

15 *Macbryde v. Weeks*, 22 Beav 533.

16 *Nicholson v. Smith*, 22 Ch D 657.

17 *Caltex (India) Ltd. v. Bhagwan Devi*, AIR 1969 SC 405.

18 *Subimal v. Radhanath*, 60 C 1372.

19 *Krishna v. Khan*, 63 C 804; *Gomathinayagam Pillai v. Palaniswami Nadar*, AIR 1967 SC 868.

20 *Mangal Ram v. Premananda*, AIR 1972 Assam 8, 10.

1 *Banku v. Galstaun*, 27 CWN 77 PC.

2 *Karim v. Idu*, 40 IC 381.

3 *Steedman v. Drinkle*, (1916) AC 275, *Kilmer v. British Columbia Orchard Lands*, 1915 AC 319 *referred to*; see *Kanshi v. Baijnath*, 98 IC 890; *per contra Mussen v. Van Diemen's Land Co.*, 1938 Ch 253; *Madan v. Jawala*, 1950 EP 278.

if any, to the title within 7 days from the delivery of the abstract makes time of the essence of the contract, so that if the objection be taken too late, the deposit cannot be recovered.⁴ Where a contract for sale provides that if the balance of the price is not paid on or before a specified date, the earnest money shall stand forfeited, time must be regarded as of the essence of the contract, and the contract shall lapse on such failure.⁵ But if the vendor does not himself comply with the stipulation as to time by delivery of the abstract in time,⁶ or delivers an abstract which does not disclose a title at all,⁷ he cannot hold the purchaser bound by the stipulation to send him the objection within the time limited for that purpose. In the case of the sale of a public house as a going concern time is of the essence of the contract.⁸ If in a contract for the sale of land time is expressly made of the essence, specific performance cannot be decreed in favour of the party in default however trivial.⁹ If a building owner orders extra work beyond that specified by the original contract, which has necessarily increased the time requisite for finishing the work, he cannot claim the penalties provided for by the contract.¹⁰ Unless a contrary intention is apparent upon the sale of a contingent reversionary interest, time is deemed to be of the essence of the contract.¹¹

5. **Resale of land.**—The doctrine that time may not be of the essence of the contract, which arises on the construction of a contract of sale of land, does not apply to a contract for resale of property conveyed,¹² nor to a sale with an option of repurchase within a prescribed time.¹³

6. **Sale of goods.**—Time is of the essence in case of contracts for the sale of goods, because prices vary not only from day to day but from hour to hour.¹⁴ "Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance. There is no reason why a term which is found in a contract should not be fulfilled".¹⁵ The operation of the section is not confined to contracts under which the property in the goods sold does not pass to the buyer, but extends also to the case of contracts for the sale of ascertained goods where property passes by the contract to the buyer.¹⁶ Even where time is not of the essence of the contract, inordinate delay on the part of either side is a good ground for putting an

4 *Rosenberg v. Cook*, 8 QBD 162; *Oakden v. Pike*, 34 LJ Ch 620; see *Nilmoney v. Dinendra*, 51 CLJ 264.

5 *Trailakyanath v. Provabati*, AIR 1974 Cal 261, 264.

6 *Upperton v. Nicholson*, LR 6 Ch 436.

7 *Want v. Stallibars*, LR 8 Ex 175.

8 *Cowles v. Gale*, LR 7 Ch App 12.

9 *Brickles v. Snell*, 38 IC 123 PC.

10 *Narayanaswami v. Madras Ry.*, 13 MLJ 488.

11 *Patrick v. Milner*, 2 CPD 342.

12 *Samarapuri v. Sudarsana*, 42 M 802, fold in *Maung Wala v. Shwe*, 1 Rang 472, 82 IC 610; *Mg. Po. v. Mg Schwe*, 70 IC 126; see *Dakshina v. Dhanakoti*, 48 MLJ 661; *D. M. M. Lal v. L. P. Lal*, AIR 1973 All 16, 19.

13 *Shriram v. Ram*, 1947 N 208; *H. N. Malak v. Mohansingh*, AIR 1974 Bom 136, 138, 140.

14 *Balaram v. Gudiyatam*, 49 MLJ 200; *Reuter v. Sala*, 4 CPD 239.

15 *Bowes v. Shand*, 2 AC 455, 463, 466: (1874-80); All ER Rep 174.

16 *Buldeo v. Howe*, 6 C 64.

and to the contract, even though no notice has been sent asking for delivery and in default purporting to cancel the contract.¹⁷ Instead of promising to do a certain thing before a specified time, parties very often contract to make an article "as soon as possible" without specifying any date. That expression does not mean "as soon as I possibly can", or "the means at my disposal might allow", but it means to do the thing within a reasonable time, with an undertaking to do in the shortest practicable time.¹⁸

A contract to supply goods to the plaintiff by the defendant was on a printed document with the terms regarding quantity, quality, price, shipment, payment, and the remarks column filled in manuscript. Against 'Shipment' there was written "October/November 1950". In the remarks column the following was written: (1) "Invoice weight to be accepted. (2) This contract is subject to import licence and therefore the shipment date is not guaranteed". It was held that considering that in commercial contracts time is ordinarily of the essence of the contract, and giving the word 'therefore' its natural, grammatical meaning, it must be held that what the parties intended was that to the extent that the delay in obtaining import licence stood in the way of keeping to the shipment date 'October/November 1950' the shipment date was not guaranteed; but with this exception shipment October-November 1950 was guaranteed.¹⁹

7. **Time subsequently made essential.**—Time mentioned in a contract of sale, though not of the essence of the contract, may be made so by giving notice subsequently.²⁰ Of course, there is no *right* in either party to a contract by notice so to engraft time as to make it of the essence of the contract if it has not been already of the essence. But a party may be allowed to limit a particular time within which an act is to be done if there has been such improper conduct on the part of the other as to justify the rescission of the contract *sub modo*, that is, if a reasonable notice be not complied with.¹ Thus, a buyer has no right without the consent of the seller to extend the time for the completion of a contract and claim damages prevailing at the deferred date.² No absolute rule can be laid down as to what is a reasonable notice.³ It must depend upon the circumstances of each case with due consideration of the leisurely manner in which the parties have proceeded and of the fact that they will not be prejudiced by further delay of a few days in completion of the contract.⁴ The

17 *Pearl Mill v. Ivy Tannery*, (1919) 1 KB 78; (1918-19) All ER Rep 702; *Hartley v. Hymans*, (1920) 3 KB 475; (1920) All ER Rep 174.

18 *Hydraulic Engineering Co. v. Mc. Haffie*, 4 QBD 670.

19 *C. C. Exporters v. B. R. C. Mills*, AIR 1961 SC 1295, 1298.

20 *Janardan v. Bhairab*, 30 IC 365; *Mahomed v. Wilkie*, 6 CLJ 682, 692 PC; Halsbury, 4th ed., Vol 9 Para 485.

1 *Green v. Sevin*, 13 Ch D 189; (1874-80) All ER Rep 831; the 3 week's notice after a delay of 2 years was regarded unreasonable; but 14 days' notice, *Compton v. Bagley*, (1892) 1 Ch 313; a week's notice *Mc. Murray v. Spicer*, LR 5 Eq 527, 543; 5 days' notice, *Gandhi v. Mahomed*, 48 MLJ 484 PC have been held to be reasonable.

2 *Abdulali v. Gokaldas*, 97 IC 269.

3 *Mc. Murray v. Spicer*, LR 5 Eq 527, 543.

4 *Motilal v. Moosa*, 41 CLJ 384 PC.

question of reasonableness must be determined as at the date when the notice is given,⁵ the day of notice is probably to be excluded.⁶ Where the notice is unreasonable it is ineffectual in making time of the essence of the contract.⁷

8. Paragraph 3.—The promisee is given by the section the option to avoid the contract where the promisor fails to perform the contract at the time fixed. It is open to the promisee not to exercise the option, but he cannot thereby alter the date of performance fixed by the contract. Under S. 63 time for performance can only be extended by an agreement arrived at by both parties. The fact that the contract is not put an end to does not entail the further consequence that the time for performance is automatically extended. Forbearance to sue or give notice of rescission cannot be an extension of time for the performance of the contract.⁸ The section means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time.⁹ Where delivery was tendered after the expiry of the specified time, and accepted without any protest at that time or without any indication of any intention to claim compensation for loss occasioned by the breach, that amounted to a condonation of the breach by the acceptance.¹⁰ Where on the failure of the contractor to finish the work by the date fixed in the agreement the contractee allows him time to continue and complete it without imposing any penalty in terms of the contract or rescinding the contract, the contractee is not entitled to any compensation as the contractee must be deemed to waive his right to fix it and recover it from the contractor.¹¹ On the promisor's failure to perform within the stipulated time he loses the power to enforce the contract. The promisee, on the other hand, has the option of enforcing it or not as may suit him. The damages he will be entitled to claim under S. 70 will be assessed with reference to the date of breach, i.e., the date stipulated in the agreement and not the date of rescission. The plaintiff is not entitled to include any aggravated damages caused by his action or inaction subsequent to the breach.¹²

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has pro-

5 *Crawford v. Toogood*, 13 Ch D 153: 49 LJ Ch 108.

6 See *Goldsmith Co. v. W. M. Ry.*, (1904) 1 KB 1: (1900-03) All ER Rep 667.

7 *Mc. Murray v. Spicer*, LR 5 Eq 527, 543.

8 *Anand v. Bhola*, 1946 B 1.

9 *Muhammad v. Bird*, 48 IA 175.

10 *Manni Lal v. Nihal*, 128 IC 67; *Burn & Co. v. Luckdirji*, 30 CWN 145 PC.

11 *State v. Chandra Mohan*, AIR 1971 Raj 229, 231-32.

promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

- (a) A agrees with B to discover treasure by magic. The agreement is void.
- (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
- (d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

Sec. 56, it is said, is based on the English rule of frustration of contracts. In *Satyabrata's case*,¹² the Supreme Court in indicating the true scope and effect of sec. 56 considered to what extent, if any it incorporates the English rule of frustration of contracts. It was contended, *inter alia*, on behalf of the appellant that the English doctrine of frustration of contracts had no application to India in view of the statutory provision contained in sec. 56 of the Indian Contract Act.

As to the juridical basis of the doctrine of frustration, Mukherjea J, in delivering the judgment of the court observed: ". . . the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

His Lordship relied upon the dictum of Lord Soreburn in *Tamplin Steamship Co. Ltd v. Anglo-Mexican Petroleum Products Co. Ltd*¹⁴ that the parties shall be excused if substantially the whole contract becomes impossible of performance or in other words, 'impracticable' by some cause for which neither was responsible. His Lordship also quoted with approval the following observations of Viscount Maugham in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*¹⁵ "The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made". His Lordship further pointed out that

¹² *Mutthaya v. Lekku*, 37 M 412, 14 IC 255; see *Annaswami v. Zamindar of Ayakudi*, 6 IC 740; *Sahu v. Kandhaia*, 14 IC 129.

¹³ AIR 1954 SC 44.

¹⁴ (1916) 2 AC 397, 403.

¹⁵ 1942 AC 154, 158.

Lord Porter also agreed with this view and rested the doctrine on the same basis.

His Lordship approved of the view expressed by a Division Bench of the Nagpur High Court in *Kesari Chand v. Governor-General in Council*¹⁶ that the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties, that the doctrine being a special case of impossibility comes under sec. 56 of the Indian Contract Act. According to His Lordship, this view was fortified by the pronouncement of the Supreme Court in *Ganga Saran v. Ram Charan*,¹⁷ where Fazl Ali, J., in speaking about frustration, observed: "It seems necessary for us to emphasise that so far as courts in this country are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the Indian Contract Act., 1872".

His Lordship concluded this part of the judgment as follows: "We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of sec. 56 of the Indian Contract Act". His Lordship in this connection pointed out two things: (1) that it could be incorrect to say that section 56 of the Contract Act applies only to cases of physical impossibility, and (2) that it would be incorrect to say that where section 56 is not applicable, recourse can be had to the principles of English law on the subject of frustration. His Lordship laid emphasis on the fact that to the extent the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and that it is not permissible to import the principles of English law 'dehors' these statutory provisions. As to the utility of English decisions His Lordship said: "The decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those which have come before our courts".

After giving warning against importing the principles of English law, His Lordship sought to clear up the complexities of the English law on the subject of frustration. In the opinion of His Lordship, the law of frustration in England developed under the guise of reading implied terms into contracts. The court implies a term or exception and treats that as part of the contract. Blackburn J. first formulated, His Lordship pointed out, the doctrine in its modern form in *Taylor v. Caldwell*.¹⁸ The court there was dealing with a case where the defendant agreed with the plaintiff to hire to the plaintiff a music-hall for the purpose of entertainment. Before the arrival of the day of performance the music-hall was destroyed by fire. The defendant was held not liable to pay damage for the breach of the contract which the defendant, through no fault of his own, was unable to perform. It was so held because the contract was not to be construed as a positive contract, but as subject to an implied condition 'that the parties shall be excused in case, before breach, performance becomes impossible

16 ILR (1949) Nag 718.

17 AIR 1952 SC 9, 11.

18 (1863) 3 B&S 826.

from the perishing of the thing without default of the contractor'. Blackburn J. laid down the following principle. In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance, even though the promise is in words which are positive and even though there is no express stipulation that the destruction of the person or thing shall excuse the performance; the excuse is by law implied.

The next case cited by His Lordship was *Robinson v. Davidson*.¹⁹ In that case there was a contract between the plaintiff and the defendant's wife (as the agent of her husband) that she, an eminent piano-forte, would perform at a concert to be given by the plaintiff on a specified day. On the day in question she was unable to perform on account of illness. The contract was silent as to what was to be done in case of her being too ill to perform. In an action against the defendant for breach of contract it was held that the wife's illness and the consequent incapacity excused her and that the contract was in its nature not absolute but conditional upon her being well enough to perform. Bramewell, B. pointed out that in holding that the illness of the defendant incapacitated her from performing the agreement the court was not really engrafting a new term upon an express contract. It was not that the obligation was absolute in the original agreement and a new condition was subsequently added to it; the whole question was whether the original contract was absolute or conditional and having regard to the terms of the bargain, it must be held to be conditional.

His Lordship next pointed out that the English law passed through various stages of development since the decision in *Robinson v. Davidson*¹⁹ and that the principles enunciated in the various decided authorities could not be said to be in any way uniform. In many of the pronouncements, observed His Lordship, of the highest courts in England the doctrine of frustration was held to be a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands, vide—*Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*²⁰ His Lordship summarised as follows the rule laid down in *Dahl v. Nelson Donkin & Co.*¹ "The court, it is said, cannot claim to exercise a dispensing power or to modify or alter contracts. But when an unexpected event or change or circumstance occurs, the possibility of which the parties did not contemplate, the meaning of the contract is taken to be not what the parties actually intended, but what they as fair and reasonable men would presumably had intended and agreed upon, if having such possibility in view they had made express provision as to their rights and liabilities in the event of such occurrence.

This view, His Lordship pointed out, was reiterated by Lord Wright in these words in *Joseph Constantine S.S. Line Ltd. v. Imperial Smelting Corpn. Ltd.*² "In ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended, but

19 (1871) 6 Ex 269.

20 1926 AC 497, 510.

1 (1881) 6 AC 38, 59.

2 (1942) AC 154, 185.

what as reasonable men they should have intended. The court personifies for this purpose the reasonable man".

His Lordship then drew our attention to the following observations of Lord Wright in *Denny, Mall and Dickson Ltd v. James B Fraser & Co. Ltd.*,³ by way of further clarification: "Though it has been constantly said by high authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers, have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract. . . . To my mind the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation".

His Lordship next stated that in the recent case of *British Movietonews Ltd. v. London and District Cinemas Ltd.*,⁴ Lord Denning, L. J. too accepted the view of Lord Wright and by way of illustration quoted the following extract from the judgment of Lord Denning in that case: "The court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation. . . . The day is gone when we can excuse an unforeseen injustice by saying to the sufferer 'it is your own folly, you ought not to have passed that form of words. You ought to have put in a clause to protect yourself'. We no longer credit a party with the foresight of a Prophet or his lawyer with the draftsmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that he who clings to the letter clings to the dry and barren shell and misses the truth and the substance of the matter. We have of late paid heed to this warning, and we must pay like heed now".

His Lordship also noted that this decision of the Court of Appeal was reversed by the House of Lords and that the Viscount expressed disapproval of the way in which the law was stated by Denning, L. J. It was held that there was no change in the law as a result of which the courts could exercise a wider power in this regard than they used to do previously.

His Lordship quoted the following extract from the judgment of Viscount Simon as a specimen of the latest theory on frustration: "The principle remains the same. Particular applications of it may greatly vary and theoretical lawyers may debate whether the rule should be regarded as arising from implied term or because the basis of the contract no longer exists. In any view it is a question of 'construction' as Lord Wright pointed out in *Constantine's Case*⁵ and as has been repeatedly asserted by other master of law".⁶

3 1944 AC 265, 275.

4 (1951) 1 KB 190.

5 1942 AC 154.

6 *Br. Movietonews Ltd. v. London etc. Cinemas Ltd.*, (1952) AC 166, 184.

As to the effect of the differences among English Judges in the way of formulating legal theories on frustration His Lordship observed: "These differences . . . really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in sec. 56 of the Contract Act, taking the word 'impossible' in its practical and not literal sense. It must be borne in mind, however, that section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties."

As to the applicability of the principle of construction as enunciated by the House of Lords in the case of *British Movietonews Ltd.*,⁷ His Lordship observed as follows: "In the latest decision of the House of Lords referred to above, the Lord Chancellor puts the whole doctrine upon the principle of construction. But the question of construction may manifest itself in two totally different ways. In one class of cases the question may simply be, as to what the parties themselves had actually intended, and whether or not there was a condition in the contract itself, express or implied, which operated, according to the agreement of the parties themselves, to release them from their obligations; this would be a question of construction pure and simple and the ordinary rule of construction would have to be applied to find out what the real intention of the parties was".

His Lordship after pointing out that according to sec. 9 of the Indian Contract Act a promise may be express or implied proceeded to examine whether a contract containing expressly or impliedly a term providing for its discharge on the happening of certain circumstances fell within the purview of sec. 56, and came to the following conclusion: "In case, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under sec. 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act."

His Lordship next proceeded to deal with the second way in which the question of construction may manifest itself. According to English Judges, His Lordship pointed out, a question of construction arises when the court pronounces a contract to be frustrated and at an end on the occurrence of an event or change of circumstance which is so fundamental as to be regarded by law as striking at the root of the contract as a whole. "This may be", observed His Lordship, "called a rule of construction by English Judges, but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of sec. 56 of the Indian Contract Act". According to His Lordship, the English doctrine of frustration in so far as it lays down that the court can pronounce a contract to be frustrated and at an end on the occur-

rence of an event which strikes at the root of the contract as a whole comes within the purview of sec. 56, but the rule of implied condition, which too forms part of the English doctrine of frustration falls outside the ambit of sec. 56.

As to the nature of an absolute contract, His Lordship observed: "...if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. His Lordship fortified his view by referring to the following extract from the judgment of Lord Atkinson in *Mathey v. Curling*:⁸ "A person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies . . . or vis major".

It may be mentioned at this place that even in England in recent years the theory of the implied term has been replaced by the theory of the radical change in the obligation. This theory, as enunciated by Lord Radcliffe in *Davis Contractors Ltd. v. Fareham U.D.C.*,⁹ postulates "that frustration occurs whenever the law recognises that without default on either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract". This is also frustration within the meaning of section 56 of the Indian Contract Act, as elucidated by the Supreme Court in *Satyabrata's case*¹⁰ under sec. 56 of the Contract Act as well as under the theory of the radical change in the obligation, the contract comes to an end by operation of law and not in accordance with the intention of the parties. Hence the legal position as to frustration in England after the decision in the case of *Davis Contractors Ltd.*¹¹ and in India under sec. 56 of the Contract Act is substantially the same.

In *Satyabrata's case*¹² the dispute between the parties centred round the short point as to whether a contract for the sale of land was discharged and came to an end by reason of certain supervening circumstances. The responded company started a scheme for the development of a large tract of land for residential purposes. The entire area was divided into a large number of plots.

The company undertook to construct the roads and drains. One Bijoy entered into a contract with the company for purchase of a plot of land measuring about 5 cottas within the scheme. He paid Rs. 101 as earnest money, the total price being nearly Rs. 5,000. The conveyance was to be completed within one month from the date of completion of roads on payment of the balance, time being the essence of the contract. The benefit of the contract was assigned by Bijoy to the appellant. The entire land of the scheme was requisitioned for

8 (1922) 2 AC 180, 234.

9 [1956] AC 696, 728-29.

10 AIR 1954 SC 44.

11 1956 AC 696.

12 AIR 1954 SC 44.

war purposes. Thereupon the company decided to treat the agreement for selling the plot to Bijoy as cancelled. Bijoy was given the option either to take back the earnest money, or to pay the balance and take the land in the condition in which it existed, the company undertaking to construct roads and drains after the war.

The respondent as the assignee of Bijoy sued the company in January, 1946 for the specific performance of the contract for sale. The suit was decreed by the trial court as well as the lower appellate court, but on second appeal the suit was dismissed by the High court on the ground of frustration. On further appeal to the Supreme Court the decision of the High Court was set aside.

The Supreme Court held that having regard to the nature and terms of the contract, the actual existence of war conditions when it was entered into, the extent of the work involved in developing the scheme and the total absence of any definite period of time within which the work was to be completed, it could not be said that the requisition order vitally affected the contract or made its performance impossible.

The view expressed by the Supreme Court in *Satyabrata's* case was reiterated in the subsequent case of *Mugneeram v. Gurbachan Singh*,¹³ the facts in both the cases being substantially the same. The respondent in the earlier case was the appellant in the later case. Sec. 56 lays down a positive rule relating to frustration of contracts and the courts cannot travel outside the terms of the section, which is exhaustive.¹⁴

Some of the leading cases on the subject may be considered. Where A agrees to deliver cotton goods to B as and when the same may be received from the mills, the contract is not frustrated if the mills fails to perform their contract with A by reason of their being engaged in fulfilling certain contracts with the Government. The words "as and when the same may be received from the mills" cannot be read as "if and when the same may be received from the mills."¹⁵ Even the destruction of the mills could not affect the contract between A and B if the contract is in absolute terms. There is no question of frustration if the mills continue to exist but did not manufacture the goods to be delivered to A.

If A agrees to deliver goods to B if and when the same may be received from the mills, the contract cannot be enforced against A if the mills fail to perform their contract with A. This result will be brought about not by the second paragraph of sec. 56 but by sec. 34 of the Contract Act.

Where A agrees to deliver cotton goods to B as soon as they are supplied to A by the Victoria Mills, the contract does not become void under para 2 of sec. 56 if the mills fail to deliver goods to A.¹⁶

Where a contract makes provision for a given contingency the doctrine of frustration is not available. In *Naihati Jute Mills v. Khyaliram*,¹⁷ a jute mill agreed to purchase jute from an importer of jute from Pakistan. The mill

13 AIR 1965 SC 1523.

14 *Dhruv Deb v. Harmohinder*, AIR 1968 SC 1024, 1026.

15 *Hurnandrai v. Pragdas*, 50 IA 9.

16 *Ganga Saran v. Firm Ram Charan*, AIR 1952 SC 9.

17 AIR 1968 SC 522, Halsbury, 4th ed. vol. 9 para 456.

undertook to procure the necessary licence for importing jute from Pakistan and to hand over the same to the importer. The mill stipulated to pay damages to the importer if it failed to procure the licence on or before a particular date. The mill failed to procure the necessary licence from the Jute Commissioner. The mill tried to avoid liability by contending that the contract was frustrated as a result of change in the policy of the Government in issuing licence for importing jute. Held that the doctrine of frustration was not available to the mill as it took upon itself the burden of paying damages on failure to procure licence.

Where by a contract A says that he will make his best endeavours to obtain a permit, he will be relieved of liability if he fails to obtain it in spite of best efforts.¹⁸ But where a party takes upon himself an absolute responsibility for obtaining a permit, he cannot escape liability whatever may be the reason for his failure to obtain a permit.¹⁹

A contract is not frustrated merely because the circumstances in which the contract was made are altered. The parties to an executory contract are often faced with an unexpected turn of events, *e.g.*, an abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution etc. Yet this does not in itself affect the bargain they have made.²⁰

In *Alopi Parshad v. Union of India*,¹ a company was appointed buying agent for the purchase of ghee for the Government of India in May, 1937 and the Government agreed to pay a buying commission and certain other charges to the agent. This contract was modified in June 1942 three years after the commencement of the Second World War by mutual consent. In December 1943 the agent demanded further revision of rates on the plea that the existing rates, fixed in peace time, were entirely superseded by the totally altered conditions obtaining in war time. The Government was not prepared to revise the rates. The dispute was referred to arbitration and the arbitrators held that the modified agreement of 1942 was binding upon the agent. This view was upheld by the High Court as well as by the Supreme Court. The agent was, according to the Supreme Court, fully aware of the altered circumstances in 1942 when the rates were modified by mutual consent, and hence no question of frustration of the contract arose. The contract would have been frustrated if a consideration of the terms of the contract, in the light of the circumstances existing when it was made, would have shown that the parties never agreed to be bound in a fundamentally different situation which unexpectedly emerged in consequence of war.

In a recent decision of the Supreme Court² the question of frustration arose under peculiar circumstances. The plaintiff appellant was the highest bidder at a Railway auction sale of slack coal under the honest and reasonable belief

18 *Anglo-Russian Merchants-Traders v. John Batt & Co.*, (1917)2 KB 679.

19 *Partabmull Rajeshwar v. K. C. Sethia*, (1951)2 All ER 352; *Peter Cassidy Seed Co. v. Qsuustukkuk Auppa*, (1957)1 WLR 273.

20 Halsbury, 4th ed. vol. 9 para 455.

1 AIR 1960 SC 588.

2 *Har Prasad v. Union of India*, AIR 1973 SC 2380.

that he would be allowed to transport the coal to his destination, but he could not transport it due to the unreasonable attitude of the Coal Commissioner. Held that there was a frustration of the contract and that the plaintiff appellant was entitled to a refund of the deposit made by him with the Railway.

A contract becomes void under sec. 56 where the performance of the contract is made impossible by the destruction of a specific thing essential to the performance. Where A agrees to let out his music hall on a particular date, the contract becomes void if the hall is destroyed by fire before the appointed day.³

A contract may become void under sec. 56 on account of the non-occurrence of a particular event. In *Krell v. Henry*⁴ the defendant agreed to take on hire a flat from the plaintiff for June 26 and 27, 1902. The coronation procession of Edward VII were to take place on those days and to pass by the flat but the contract was silent about the coronation processions. On account of the illness of the King the coronation processions could not take place on those days. The Court considered that the processions and the relative position of the flat lay at the foundation of the agreement. The contract was therefore frustrated. In terms of sec. 56 it may be said that the performance of the contract became impossible, though not physically but for all practical purposes, by reason of the abandonment of the coronation processions on the appointed days.

Where, however, parties contract in the expectation that a particular event would happen, each taking his chance, the doctrine of frustration is not applicable. Thus if D agrees to take on hire a shop room in the hope of doing brisk business during an annual fair, and the prospective customers are prevented by a severe storm from attending the fair, D will not be allowed to say that the performance of the contract by him has become impossible. In other words the contract will not be treated as frustrated by the unexpected storm.⁵

There is a lot of distinction between the motive behind a contract and the basis of a contract. In *Krell v. Henry* the coronation processions and the location of the flat were the basis of the contract whereas the doing of brisk business in a fair as in the next illustration is merely the motive behind the contract.

A contract for personal services may be rendered impossible by the death or incapacitating illness of the promisor. Where a musician promises to perform at a concert, but is prevented from doing so by a severe illness, the contract becomes void as it is rendered impossible by the illness of the musician.⁶

The second paragraph of sec. 37 of the Indian Contract Act provides that promises bind the representatives of the promisors in case of the death of such promisors before performance unless a contrary intention appears from the contract. This is illustrated by illustration (b) under sec. 37: A promises to paint a picture for B by a certain date, at a certain price. A dies before the

³ *Taylor v. Caldwell*, (1863) 3 B & S 826.

⁴ [1903] 2 KB 740.

⁵ *Herne Bay Steamboat Co. v. Hutton*, [1903] 2 KB 683.

⁶ *Robinson v. Davidson*, (1871) LR 6 Ex 269; see Halsbury, 4th ed. vol. 9, para 453 as supplement to notes 3 to 4.

day. The contract cannot be enforced either by A's representatives or by B. The same result is arrived at by applying sec. 56. The contract is rendered impossible by the death of A, hence it becomes void with the result that it cannot be enforced either by B or by A's representatives.

A contract by a jockey to ride the horses of an owner is dissolved by the death of either party.⁷ A seaman's contract of service becomes void by his internment.⁸ Contract of a music-hall artist is frustrated by his call-up for service in the army.⁹ A contract of service is frustrated where an employee is interned on the outbreak of war.¹⁰ But where a troupe of performers are engaged by a firm of music hall proprietors and one of the partners dies thereafter the contract is not frustrated since it is not of such a personal character that it cannot be enforced against the surviving partners.¹¹ A separation agreement whereby the husband agrees to pay maintenance to his wife is not rendered impossible by a subsequent decree of divorce obtained by the wife;¹² nor by a subsequent decree of nullity obtained by the husband.¹³ A contract between the headmaster and the parent of a pupil may become frustrated by the enforced absence of the headmaster if the running of the school becomes impossible in his absence, not otherwise.¹⁴

The question of a contract becoming impossible may arise in charter-parties and contracts relating to the sale and carriage of goods by sea. If D sells a cargo to P to be shipped by a particular steamship during a particular month and without any fault on the part of D the ship is so damaged by stranding as to be unable to load in the month specified the contract is rendered impossible by the accident with the result that P cannot claim any damages against D for breach of contract.¹⁵

A C.I.F. contract is not necessarily rendered impossible of performance by the fact that the usual shorter sea route becomes non-available after the contract. The closure of the Suez Canal on November 2, 1956, affected several such contracts and naturally the question of frustration arose in cases instituted for recovery of damages. In *Tsakiroglou & Co. Ltd. v. Noble Thorl G.M.C.H.*¹⁶ sellers agreed to sell to buyers a quantity of groundnuts to be shipped from Sudan to Hamburg during November-December, 1956. The price of the groundnuts C.I.F. Hamburg was clearly calculated on the assumption that the cargo would be shipped via the Suez Canal though the contract contained no term to that effect. The Canal was closed on Nov. 2, 1956 and remained closed for the next five months. The sellers' contention that the contract was rendered impossible by the closure of the Suez Canal was rejected by the House

7 *Graves v. Cohen*, 46 TLR 121.

8 *Horlock v. Beal*, [1916]1 AC 486; *Hare v. Murphy*, [1974]3 All ER 940 CA.

9 *Morgan v. Manser*, [1948]1 KB 184.

10 *Unger v. Preston Corporation*, [1942]1 All ER 200.

11 *Phillips v. Alhambra Palace Co.*, [1901]1 QB 59.

12 *May v. May*, [1929]2 KB 386 (CA).

13 *Adams v. Adams*, [1941]1 KB 536 (CA).

14 *Mount v. Oldham Corporation*, [1973]1 All ER 26 CA.

15 *Nickoll v. Ashton*, [1901]2 KB 126.

16 [1962] AC 98.

of Lords as it was possible to ship the nuts to Hamburg via Cape of Good Hope. Such a journey would not be commercially or fundamentally different from the journey through the Suez Canal, though it would be longer and more expensive. Their Lordships however pointed out that the contract would have been frustrated by the closure of the Canal if the goods were perishable or if the delivery was to be made by a definite date.

The question of frustration may arise if a ship is requisitioned by the Government. In *Bank Line Ltd. v. Capel & Co.*,¹⁷ owners of a steamship, agreed in Feb., 1915 to charter their steamship for a period of twelve months from the time the vessel should be delivered. On May 11, 1915 before delivery she was commandeered by the Government and was not released until September, 1915. The charterers' suit for non-delivery was dismissed on the ground of frustration. In the opinion of the House of Lords the contract did not place the shipowners indefinitely at the mercy of the charterers so as to oblige the owners to deliver the vessel however long the delay. But in another case, namely, *Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*¹⁸ the contract was held to be continuing in spite of requisition. There a tanker was chartered for five years from December, 1912 to December, 1917. In February, 1915 the Government requisitioned the tanker. The charterers were willing to pay the agreed freight to the owners, who, desirous of receiving much larger sum from the Government contended that the requisition had frustrated the commercial object of the venture. The House of Lords, by a bare majority, held that the contract did not come to an end, as the interruption was not of sufficient duration to frustrate the commercial object of the venture. There might be, it was pointed out, many months during which the ship would be available for commercial purposes before the expiry of five years.

Mere delay in a maritime adventure may not frustrate the contract because such delay is within the contemplation of the parties. But where the delay is such as to render the adventure absolutely nugatory, for example, in the case of perishable cargo, the contract is frustrated.¹⁹ Again, where the delay is such as to destroy the identity of the work or service when resumed with the work or service when interrupted, the contract is frustrated.²⁰ Similarly if the delay puts an end in a commercial sense to the undertaking the contract is frustrated.¹

In the case last cited in the footnote, a ship was chartered in Nov. 1871, to proceed with all possible despatch from Liverpool to Newport to load a cargo of iron rails for carriage to San Francisco. The ship started on January 2 but ran aground the very next day. She was extricated on Feb. 18 and taken to Liverpool for repair and she was not fully repaired even in August. On Feb. 15 the charterers repudiated the contract. Held that the charterers were not liable for not loading the ship as the time likely to be required for repairs

17 [1919] AC 435.

18 [1916] 2 AC 397.

19 *Bensaunda & Co. v. Thames and Mersey Marine Insurance Co.*, [1897] 1 QB 29

20 *Metropolitan Water Board v. Dick, Kerr & Co. Ltd.*, [1918] AC 119.

1 *Jackson v. Union Marine Insurance Co., Ltd.*, (1874) LR 10 CP 125.

was so long as to excuse their failure to load. The delay put an end in a commercial sense to the commercial speculation entered upon by the parties. In terms of sec. 56 of the Indian Contract Act the contract became impossible of performance by reason of the delay. In other words, the contract was frustrated.

In *Pacific Phosphate Co. Ltd. v. Empire Transport Co. Ltd.*² a contract was made in 1913 by which shipowners undertook to provide charterers with certain vessels in each of the years 1914 to 1918, and a term in the contract gave option to either party to suspend shipments on the outbreak of war till the end of hostilities. It was held that after the start of the First World War, the contract was discharged, not merely suspended, because such a catastrophic war was not in the contemplation of the parties.

The effect of delay often requires to be considered in building contracts. In *Davis Contractors Ltd. v. Fareham U.D.C.*³ certain contractors agreed to build 78 houses for a fixed sum of £94,424. Owing to unexpected shortage of skilled labour and raw materials the contract which should have been completed in or about 8 months took 22 months and the cost amounted to nearly £115,000. Held that the contract was not frustrated by the delay and that the contractors were not entitled to claim on a *quantum meruit* for the cost actually incurred. The delay no doubt made the contract more onerous to the contractors, but the ultimate situation was still within the scope of the contract.

The thing undertaken was, when performed, considered to be different from what was contracted for in *Metropolitan Water Board v. Dick, Kerr & Co. Ltd.*^{3a} There a company contracted with the Metropolitan Water Board to construct a reservoir within six years. After two years of work the company was asked by the Minister of Munitions to cease work and to dispose of its plant. The Board brought an action claiming that the contract still continued. The House of Lords held that the interruption, having regard to its character and duration, made the contract, if resumed, a different contract and that consequently the contract was discharged.

The doctrine of frustration does not apply where the impediment is created by a party to the contract. In other words, a party cannot rely upon self-induced frustration. In *Ocean Tramp Tanker Corporation v. V/O Sovfracht (The 'Eugenia')*,⁴ the owners of a vessel chartered out the vessel then at Genoa for a trip out to India via the Black Sea and back. The vessel was not to enter into or continue in a zone which was dangerous by reason of actual or threatened hostilities. In breach of this provision the charterers allowed the vessel to enter the Suez Canal when hostilities had already commenced and she was trapped when the canal was blocked. The owners claimed that the defendants had repudiated the contract by their conduct. The plea of the charterers was frustration of the contract, which was rejected by the Court of Appeal as the ship was trapped as a result of their own fault.

2 [1920]36 TLR 750.

3 [1956] AC 696.

3a [1918] AC 119.

4 [1964]2 QB 226.

Under sec. 56 a contract to do an act which becomes unlawful after the formation of the contract also becomes void. The discharge of a contract by illegality is also a part of the doctrine of frustration under the English law. Thus, a contract for the sale of goods to be imported from a foreign country becomes void if subsequent legislation prohibits the importation of such goods.⁵

A contract becomes void by reason of supervening illegality even where a statutory power in existence at the time of making the contract is subsequently exercised to render illegal the performance of the contract. Thus, where wheat is sold upon the terms that payment in cash is to be made within a week against a delivery order, but before delivery and before the property passes to the buyer the Government requisitions the wheat under an Act passed before the date of the contract, the contract becomes void by reason of illegality and the seller is excused from performance.⁶ If the performance of a contract becomes illegal by a subsequent change in law the contract is discharged by reason of such illegality and the promisor is relieved of his obligation to perform.⁷

A supervening illegality may frustrate only a part and not the whole of the contract. For instance, under the Trading with the Enemy Act, 1939, it became illegal to present a cheque for payment at a bank in an enemy-occupied territory, but the holder of the cheque was entitled to sue the drawer on the cheque in England.⁸

The outbreak of war renders illegal all transactions between British subjects and alien enemies. Consequently, any contract which involves such transaction is automatically dissolved on the outbreak of the war.⁹ Thus, where a British manufacturer contracted with a Polish company to manufacture certain machinery for delivery to a Polish port, the contract was frustrated by the occupation of the Polish port by German forces in 1939.¹⁰ The contract will be wholly frustrated, even where the parties themselves provide that their obligations shall be merely postponed.¹¹

In a Bombay case, *Marshal & Co. v. Naginchand Fulchand*,¹² decided in 1916, the plaintiffs carried on business at Glasgow and the defendants doing business in Bombay ordered through the plaintiff's agent in Bombay 50 cases of aluminium circles to be delivered at Madras in C.I.F terms. The first consignment of 14 cases was duly received and paid for. The second and third consignments of 12 cases each were shipped from a German port on 16th and 25th July, 1914 respectively on two German vessels B and K. The shipping documents in respect of the goods were duly delivered along with the bill of exchange which the defendants accepted on July 31, 1914. The bill became

⁵ *Denny Mott and Dickson, Ltd. v. James B. Fraser & Co. Ltd.*, [1944]1 All ER 678, 681.

⁶ *Re Shipton Anderson & Co. and Harrison Bros. & Co.*, [1915]3 KB 676.

⁷ *Boothalinga Agencies v. V. T. C. Poriaswami*, AIR 1969 SC 110.

⁸ *Cornelius v. Banque Franco-Serbe*, [1942]1 KB 29.

⁹ *Esposito v. Bowden*, (1857)7 E & B 763.

¹⁰ *Fibrosa Spolka Akcyjna v. Fairbairn etc. Ltd.*, [1943] AC 32.

¹¹ *Ertel Bieber & Co. v. Rio Timto Co. Ltd.*, [1918] AC 260.

¹² 42 Bom 473.

payable on Oct. 2, 1914, but was not met by the defendants by payment. War between Great Britain and Germany broke out on August 4, 1914. Vessel B was seized on the voyage as a prize but on her release by the prize court the defendants obtained possession of the consignment at Madras on June 8, 1915 on payment of the principal amount due under the bill but not the interest from the date of maturity to the date of payment. On the plaintiffs' suit for interest the High Court held that as the defendants obtained all that they were entitled to obtain under the C.I.F. contract when the bill was presented for acceptance and having refused payment on maturity they were liable to pay overdue interest.

The plaintiffs also tried to enforce in the same suit another bill of exchange in respect of the goods shipped on vessel K, which was drawn on Oct. 9, 1914 and accepted on Nov. 10, 1914. The shipping documents were not however received by the defendants at the time of the acceptance of the bill, but were tendered after the suit. The plaintiffs sued in February to recover the amount due on the second bill. The High Court held that the bill of lading became a void contract on Nov. 10, 1914 when the bill was accepted, that consequently there was a failure of consideration for the acceptance of the bill and that the defendants were therefore not bound to pay at maturity. The bill of lading became void on declaration of war, that is, on Aug. 4, 1914 in both the cases, but in respect of the earlier consignment the bill of exchange had been accepted before the bill of lading became void, whereas in respect of the later consignment the bill of exchange was accepted after the bill of lading became void. Hence the claim of the plaintiffs in respect of the earlier consignment was allowed but their claim in respect of the later consignment was dismissed. Where a Hamburg merchant drew a bill of exchange upon the defendant in Bombay in favour of the plaintiff and the bill was accepted by the defendant before the war, held, the plaintiff was entitled to recover on the bill.¹³

The effect of war upon contracts of affreightment made before, but which remains unexecuted at the time of the declaration of war, is to dissolve the contract and to absolve both parties from further performance of it.¹⁴ It is not every contract that is abrogated by the war, but only a contract which is still executory and which for its execution requires intercourse between the British subject and the enemy.¹⁵

In *Abdul Razack v. Khandi Row*¹⁶ a contract was made on 25th August, 1914 after the outbreak of war with Germany on the 4th August, 1914 between the plaintiff appellants who were merchants at Ambur in Madras and the defendant respondents who were importers of German dyes to Madras and Tuticorin. The defendants agreed to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the

13 *Motishaw v. Mercantile Bank*, 41 Bom 566.

14 *Esposito v. Bowden*, 7 E & B 763; *Ertel Bieber v. Rio Tinto*, 1918 AC 260, see illust. (b); *Marshall v. Naginchand*, 42 Bom 483.

15 *Karberg v. Blythe*, (1916) 1 KB 495; as to the effect of war on interest see *Padgeth v. Jamshedri*, 41 Bom 390, 396; *Valli v. Berthold*, 44 Bom 1.

16 (1918) 41 Mad 225.

war. Under the contract the defendants were not to be liable in case of non-arrival of the steamers at Madras or Madurai on account of the state of war. The Royal Proclamation prohibiting trading with the enemy and in enemy goods as illegal came into force on 9th Sept. 1914. The ship and the dyes were in fact seized in October 1914 and condemned in Sept. 1915 as prize by a Prize Court at Alexandria. In the meantime, the defendants got the goods released on payment of double the invoice value. The ship and the goods eventually arrived in Colombo in May 1915. The plaintiffs claimed the right to delivery of the above-mentioned goods. The suit was dismissed by a single Judge of the Madras High Court and then by a Division Bench on appeal. The contract was held to be unenforceable. Held further (a) that the effect of the Royal Proclamation was to render further performance of the contract illegal and to put an end to the contract; (b) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the defendants of the goods as from the date by seizure; and (c) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance was immaterial as the goods ceased to be goods consigned to the defendants.

An executory contract concluded before the outbreak of war with an alien enemy is merely suspended during the war as regards the right to performance or the right of action and is dissolved only in certain circumstances, e.g., if its performance necessitates intercourse with the enemy during the war.¹⁷ Unconditional contracts, as a general rule, are not dissolved by their performance becoming impossible owing to war.¹⁸ By a contract dated 17th July 1914 the defendants purchased from the plaintiffs 900 bags of sugar C.I.F. Mahomerah, July shipment. The plaintiffs got the sugar shipped at Hamburg on a German vessel on July 28, 1914. The shipping documents relating to the said sugar were presented after their arrival in Bombay by the plaintiff to the defendants on Aug. 15, 1914 for acceptance. Royal Proclamation prohibiting trading with the enemy having been issued on Aug. 5, 1914, the defendants refused to accept them. Held that in view of the Government Proclamation the tender of the shipping documents was not valid and that acceptance of an payment against the said documents would be a violation of the said Proclamation.¹⁹

A contract between British subjects for supply of goods to be obtained from a belligerent country was held to have become void on the outbreak of the First World War on the ground of illegality, because the contract involved intercourse with the enemy or conferred an immediate or future benefit on the enemy.²⁰ Where a Hamburg merchant drew a bill of exchange upon the defendant in Bombay in favour of the plaintiff and the bill was accepted by the defendant before the war, held the plaintiff was entitled to recover on the bill.¹

¹⁷ *Esposito v. Bowden*, 27 LJ QB 17.

¹⁸ *Seth v. Mudhoram*, 33 IC 540; *Janson v. Driefontein*, 1902 AC 484; *Marshall & Co. v. Naginchand*, 42 B 473

¹⁹ *Nissim Isaac Bekhor v. Haji etc. Co.*, 40 Bom 11.

²⁰ *Re Badiseke*, (1921)2 Ch 381, 373 *et seq.*

¹ *Motishaw v. Mercantile Bank*, 41 Bom 566.

An agreement between two partners to import synthetic stones from a foreign firm becomes void if the foreign firm is declared to be an enemy firm subsequently. If the stones, of which one of the partners is the consignee, are confiscated by the Customs and thereafter delivered to the consignee partner the contract of partnership is not revived.²

Under a C.I.F. contract, the property in the goods passes at the time of shipment subject to the buyer's right to reject the goods after inspection if they are found to be not goods in accordance with the contract.³ The bargain under a C.I.F. contract is fulfilled by the delivery of the documents representing goods and not by the actual physical delivery of the goods by the seller. The seller under a C.I.F. contract undertakes: (a) to ship at the port of shipment within the time mentioned in the contract goods of the description contained in the contract, (b) to procure on shipment a contract of affreightment under which the goods will be delivered to the destination contemplated by the contract, (c) to effect an insurance on the goods upon the terms current in the trade which will be available for the benefit of the buyer, (d) to make out an invoice of the goods and (e) to tender the documents to the buyer—the bill of lading, the invoice and the policy of insurance.⁴

As to the applicability of the doctrine of frustration to a lease the Supreme Court has held that it is not applicable.⁵ The appellant in the first of the two cases just cited in the footnote took on lease some agricultural land before partition of India. After partition the demised land fell into the territory of Pakistan and the appellant having migrated to India was not in a position to cultivate it. The appellant brought an action for a decree for refund of the rent paid by him on the ground of frustration. The suit was dismissed by the Supreme Court as in the opinion of the High Court and the Supreme Court the doctrine of frustration did not apply to a lease. In 1945 the Patna High Court too took the same view in *Surpat Singh v. Sheo Prasad*.⁶

But the doctrine applies to an agreement to lease. Where the object of a proposed lease before the execution of the deed of lease becomes impossible because of supervening events the agreement to lease becomes impossible of performance. In *Sushila Devi v. Hari Singh*⁷ the plaintiffs sought to take on lease certain properties for personal cultivation and for settling tenants immediately before the partition of India. As the said lands fell within West Pakistan it was not possible for the plaintiffs on account of communal disturbance to take possession of the lands and enjoy them. Held that the agreement to lease became void by reason of frustration of the contract.

The doctrine does not apply where there is an express contract to repay money in case of supervening impossibility of performance of a major obliga-

2 *Trilokidas v. R. N. Damodar*, AIR 1971 Raj 88.

3 *Ah Choy v. Trading Co.*, 56 IC 978.

4 *Herman & Mohatta (India) Ltd. v. Pran Ballav*, AIR 1960 Cal 524, 527.

5 *Dhruv Dev v. Harmohinder Singh*, AIR 1968 SC 1024; *H. V. Rajan v. C. N. Gopal*, AIR 1975 SC 261.

6 AIR 1945 Pat 300.

7 AIR 1971 SC 1756.

tion. Thus in a Bombay case decided in 1947 the plaintiff agreed to purchase for the plaintiff 300 bales of cotton yarn and ship them from Jaffarbad (in Janjira State) to Khoramshare. The contract further provided that if the defendant was unable to effect the shipment he was to repay to the plaintiff the cost paid and other expenses and was to forfeit the claim for remuneration and commission. The defendant received nearly Rs. 3 lakhs from the plaintiff. The goods were frozen by the Dewan of Cambay for violation of import regulations. A suit by the plaintiff for the recovery of the amount advanced was resisted by the defendant *inter alia* on the plea that the agreement had been terminated by frustration. But the suit was decreed as there was an express undertaking to repay.⁸

A contract is not frustrated if only one of the many possible ways of performing it becomes illegal and impossible. In an East African case decided by the Privy Council in 1944, T company contracted to supply steel rails Krupp section to U company. A carefully drawn specification defined precisely what were the goods called for by the contract. That specification did not define what was to be the source of the goods. On the breach of the contract to deliver steel rails U company sued for damages. According to T company the contract was frustrated on the declaration of war against Germany, because the contract required T company to obtain rails from Germany. The Privy Council pointed out that there was no such provision in the contract, and that there were many possible sources of supply, *e.g.*, England, America, France etc. Hence it was held that the contract was not frustrated, because only one of the many possible ways of performing it had become illegal or impossible.⁹

No question of frustration arises when the contract is conditional. In a Bombay case decided in 1889, the defendant agreed to pay the plaintiff rent at the rate of Rs. 329 per month for one year for being allowed to blast stones from places to be pointed out by the plaintiff. The defendant failed to renew the licence for blasting from the authorities. On an interpretation of cl. 6 of the contract the Court held that it was the intention of the parties that the monthly sum of Rs. 329 should only be payable so long as quarrying was permitted by the authorities, and that there was no unconditional contract to pay Rs. 329 in all events. The suit was accordingly dismissed.¹⁰

A contract to supply a thing at a specified time is not frustrated if the thing is not available at the time specified. In *Karl Ettlinger v. Chagandas & Co.*¹¹ the plaintiffs, doing business in London, made a contract on 24th July 1914 with the defendants through their London agent, by which the defendants agreed to supply the plaintiffs with 1,000 tons freight at 11s. 6d. per ton for carrying manganese from Bombay to Antwerp, shipment in September. On the shipment of manganese being prohibited by the Government of India on 5th August, 1914, the defendants repudiated the contract on 7th August, 1914. The plaintiffs sued the defendants in damages. The contention of the defendants

⁸ *M. M. Tacki v. Dharamsey*, AIR 1947 Bom 98.

⁹ *T. O. T. Co. v. Uganda Sugar Factory*, AIR 1945 PC 144.

¹⁰ *Goculdas Madhavji v. Narsu Yankuji*, 13 B 630.

¹¹ 40 B 301.

that the performance of the contract became impossible as no freight was procurable during the month of September from Bombay to Antwerp was rejected by the High Court.

In a Calcutta case decided in 1921¹² a contract for the delivery of goods was held to have been frustrated by two years' delay. There the contract was for sale by the defendant of certain goods on arrival. The goods were shipped from Germany in July 1914 by the defendant's sellers in a German ship, which was captured by the British in the Mediterranean shortly after the outbreak of the war. But after proceedings in a Prize Court at Alexandria the goods arrived in a different ship after two years. Held that the plaintiff was not entitled to the delivery of the goods on their arrival in June 1916. The arrival, according to Sanderson, C.J. was not such an arrival as was contemplated by the parties. The purpose of the contract and the intention of the parties were altogether upset by the capture of the ship.

In a Nagpur case decided in 1945¹³ a contract to carry was held to have become void on the ground of impossibility as well as illegality. The plaintiff contracted to carry in his truck certain bales of cotton of the defendant from one town to another. Before all the bales could be transported the plaintiff's truck was requisitioned for military purposes under the Defence of India Rules. Any breach of the Order of requisition would have rendered the plaintiff liable to punishment. Held that the contract was frustrated on requisition, that the contract for carrying the remaining bales was not capable of performance and that the plaintiff was not liable for non-performance even if the plaintiff was aware that the truck might be requisitioned by the Government and did not inform the defendant of the same. The claim of the plaintiff for the amount due for the bales actually carried was allowed.

Where the father agrees to give his daughter in marriage to a particular bridegroom the contract is frustrated on the death of the daughter before the date of marriage, but it is not frustrated on the daughter's refusal to marry the said bridegroom.¹⁴

Only a part of a contract and not the whole of it may become void by reason of impossibility of performance. In *Inder Pershad v. Campbell*,¹⁵ the plaintiff agreed to grow indigo for the defendant for nine years on 20½ bighas of land, 16½ of which were situated in village R, which he held under a sub-lease from a factory, and the remaining 4 in village K, of which he was the proprietor. After nearly 2½ years, the factory was ejected, and consequently the plaintiff lost possession of his 16½ bighas of land held under the factory. He brought a suit to be relieved of his liability to grow indigo on 16½ bighas. Held that the contract to the extent that it had become impossible became void.

In cases of frustration, it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as

12 *Gouri Sankar v. H. P. Moitra*, 26 CWN 573.

13 *Noorbux v. Kalyandas*, AIR 1945 Nag 192.

14 *Purshotamdas v. P. M. Nathubhoy*, 21 B 23.

15 7 Cal 474.

the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes.¹⁶

In the case last mentioned in the footnote, a party in India entered into a contract in July 1958 for purchase of jute from Pakistan. He was aware of the restrictions imposed by the Government of India in granting licences for such a purchase; still he undertook to obtain the licence. The contract specifically provided that the delay to provide a licence in November 1958 was to be excused but that the contract was to be settled at the market rate prevailing on Jan. 2, 1959 if the buyer failed to deliver the licence in Dec., 1958. Held that the buyer having taken upon himself absolutely the burden of obtaining the licence latest by Dec., 1958 and having agreed to pay damage on the basis of the price on Jan. 2, 1959, the defence of impossibility of performance or the defence that the court should spell out an implied term of the contract would not be available to the buyer.

Where a clause in a building contract provides that alterations in specifications and designs during the progress of the work shall not invalidate the contract and the contractor carries out a certain additional item of work according to the altered specifications, it cannot be said that the performance of the contract has become impossible. A contract is not frustrated merely because the circumstances in which the contract was made are altered.¹⁷

When a leased building is demolished by the municipality the lease does not become impossible of performance, because the doctrine of frustration does not apply to contracts creating interests in land which had already accrued.¹⁸ But attention may be drawn to sec. 108(e), Transfer of Property Act, which runs thus: "If by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially or permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void" Sec. 56 of the Contract Act is inapplicable to a case of lease governed by the provisions of the Transfer of Property Act.¹⁹

57. Reciprocal promises to do things legal, and also other things illegal.—Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

¹⁶ *Naihati Jute Mills v. Khyaliram*, AIR 1968 SC 522.

¹⁷ *State v. Motiram*, AIR 1973 Raj 223, 231-32.

¹⁸ *Rahim Bux v. Mohammad Shafi*, AIR 1971 All 16.

¹⁹ *Rajendra Nath v. Ramdhin*, AIR 1971 Assam 160.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

The section.—The section should be read along with S. 24 which lays down the main principle. The rules embodied in this section and in the next may be looked upon in the light of exceptions to that principle. Generally speaking, an agreement is entire, but the parties may make a contract in its terms a divisible contract, when a right to performance arises on execution of a part of the contract.²⁰ Where the condition which is good in a bond can be separated from that which is bad, the bond is good.¹ Whether a contract is divisible or not must be determined by the facts of each particular case. A contract entered into by agents in regard to the distinct and different shares of co-sharers is *prima facie* divisible.²

58. Alternative promise, one branch being illegal.—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and *B* agree that *A* shall pay *B* 1,000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice and void agreement as to the opium.

The section.—The general rule is that a person who enters into an alternative covenant has his choice between two alternatives.³ The section lays down another exception to the rule enunciated in S. 24 and the reason is the same as in the case of the exception mentioned in S. 57. Here although there is a single consideration yet there is an option to perform one of two things one only of which is illegal. The alternative agreements are regarded as distinct agreements. If instead of “either rice or smuggled opium” there had occurred in the illustration the words “rice and smuggled opium” the result would have been entirely different, for S. 24 would have applied in that case rendering the entire contract illegal.

Illegal.—An agreement may be illegal though its subject matter is not an offence under the criminal law but “contemplates any civil injury to third person”.⁴ If it is found that the terms of an agreement are unreasonable in the interests of the contracting parties this is enough to invalidate the contract as being in restraint of trade.⁵ An agreement to guarantee or undertake that

20. *Wilkinson v. Clements*, LR 8 Ch 96.

1. *Newman v. Newman*, 4 M & S 66: 105 ER 759.

2. *Harendara v. Nanda*, 57 CLJ 1.

3. *Re Brookman's Trust*, LR 5 Ch 191.

4. *Farmers' Mart v. Milne*, 1915 AC 106, 113.

5. *Herbert Morris Ltd. v. Saxelby*, (1916) 1 AC 688, 706, *referred to in Evans v. Heathcote*, (1918) 1 KB 418.

an honour will be conferred by the sovereign, if a certain contribution is made to a public charity or if some other service is rendered, is against public policy and therefore unlawful. If a contract has any element of turpitude in it and the parties are in *pari delicto*, no action for damages can be maintained by the party defrauded. It is not correct to say that it is only if the contract is of a criminal nature that the plaintiff is precluded from recovering.⁶ Therefore, if the illegal branch of the contract be performed the plaintiff has no right of action. Where a debt was incurred in connection with festivities held in a brothel and the plaintiff deposited with the defendant a £50 bank note by way of pledge, the maxim in *pari delicto* applied and the plaintiff could not recover.⁷ The maxim "*in pari delicto potior est conditio possidentis*" is as thoroughly settled as any proposition of law can be. It is a maxim of law established not for the benefit of the plaintiffs or defendants but founded on principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract to recover it back, for the court will not assist an illegal transaction in any respect.⁸ The true test whether the plaintiff and the defendant are in *pari delicto*, and therefore whether a demand connected with an illegal connection is capable of being enforced at law, is to consider whether the plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party.⁹ Where an executant of a deed promises either to transfer the inheritance or transfer his share in some property, the illegality of the first alternative does not affect the other alternative.¹⁰

Where *D* agrees to sell to *P* 10,000 cases of Irish stewed steak at a price higher than the maximum price permitted by emergency legislation, the contract is illegal; and if *D* fails to deliver, *P* is not entitled to claim damages for breach of contract.¹¹

Appropriation of Payments

59. Application of payment where debt to be discharged is indicated.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, accepted, must be applied accordingly.

⁶ *Parkinson v. College of Ambulance*, (1925) 2 KB 1; (1924) All ER Rep 325.

⁷ *Taylor v. Chester*, LR 4 QB 309; (1861-73) All ER Rep 154.

⁸ *Edgar v. Fowler*, 3 East 222; *Berg v. Sadler*, (1937) 2 KB 158; (1937) 1 All ER 637.

⁹ *Simpson v. Bloss*, 7 Taunt 246; cited in *Rivaz v. Nicholls*, 2 CB 501, 512, *referred to in Farmers' Mart v. Milne*, 1915 AC 106, 113.

¹⁰ *Mahadeo v. Mathura*, 29 ALJ 295.

¹¹ *David v. Barnett*, (1953) 1 WLR 562, applying the observations of Lord Dunedin in *Champsey Bhara & Co. v. Jivaraj Co. Ltd.*, (1923) All ER Rep 235; (1923) AC 480, 487.

Illustrations

(a) A owes B, among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

1. The section.—Sections 59 to 61 which embody the rule in *Clayton's case*^{11a} recognise the right of a creditor to appropriate a payment made by the debtor towards the payment of his debts and accepted by the creditor as such in the absence of any express or presumed intention of the debtor to the contrary.¹² The rule has been thus summed up: "If the payer appropriates the payment, the payee must rest content with that destination of the money; if he does not appropriate the payment, the payee may do so; if neither the one nor the other appropriates, then whenever at any time sufficient comes in to liquidate prior debts they are satisfied in order of date".¹³ It has been said in *Clayton's case*,¹⁴ "that the legal principle is that which is laid down in *Bois v. Cranfield*,¹⁵ and appears to be this, namely, that if a man owes two distinct causes and pays him a sum of money he, the debtor, has a right to say to which account the money so paid is to be appropriated." It is therefore necessary that there should be two debts upon two distinct causes. A debtor gets a right of appropriation when there are several distinct debts owed by him. Arrears of land revenue and costs incurred for its recovery form one single debt. In case of a single debt consisting of principal and interest, if the debtor appropriates towards the principal the creditor need not accept payment on those terms. If he does accept he is bound by the appropriation. If the creditor wants to appropriate payment otherwise than as directed by the debtor, he must inform the debtor of the appropriation made by him.¹⁶ This section therefore, lays down two rules: (1) It recognises the broad principle that where one man owes several different debts to another and makes a payment to the creditor, he is entitled to say to his creditor, you must apply this particular sum that I now pay to a particular debt and if the creditor accepts the payment so must the money be applied; and (2) the section further provides that if the payment is made under circumstances implying that it is to be applied to the discharge of a particular debt, it must be applied accordingly.¹⁷ Ss. 59 to 61 do not deal with cases in which principal and interest are due on a single debt.¹⁸ The section is specific and mandatory to the effect

11a 1 Mer 572, 610.

12 *Budhuram v. Kimatrai*, 84 IC 672.

13 *Kinnaird v. Webster*, 10 Ch D 139: 27 ER 212.

14 1 Mer 572.

15 82 ER 677.

16 *Harkishondas v. Nariman*, 29 Bom 950; *Manisty v. Jameson*, 5 Pat 326; *Relu Mal v. Ahamad*, 7 Lah 17; *Wasudeo v. Namdeo*, 1951 Nag 155: 1950 NLJ 44.

17 *Bansidhar v. Akhay*, 1890 AWN 62; *Halsbury*, 4th ed. vol. 9 para 505.

18 *Ha v. Sulakhan*, 1941 L 386 FB.

that the payment must be applied accordingly. Therefore it is the creditor's duty to refuse a payment if he does not agree to the specific direction as to the appropriation by the debtor. Such election by the creditor must be made at once and if he does not reject the payment at once, it is too late for him to contend that he has not received a payment legally appropriated to the particular debts. Thus, where one of several debtors makes on behalf of himself and other debtors a payment to the creditor appropriated to a specified debt, and the creditor accepts the payment, he cannot by a subsequent arrangement with the debtor divert the sum so paid to another debt.¹⁹ Mere resemblance in certain amounts between credit and debit entries is not sufficient to bring a case within the section.²⁰ The words "with express intimation" are not inconsistent with an intimation after a reasonable interval, so that the debtor need not intimate the appropriation he desires to make along with the payment or immediately thereafter. Of course, there is a chance in such a case of the creditor making an appropriation in the meantime.¹ On the other hand, it has been observed that the intimation must be synchronous with the payment.² In *Gopal v. Govind*,³ it was held that where the method of appropriation was determined at the outset by express contract between the parties, the law does not require a specific appropriation to be made on the occasion of each payment. The court has no authority to alter an appropriation made by the judgment-debtor.⁴

2. **Indication of debt to be discharged.**—The essence of an appropriation is that it should be known to both parties, an uncommunicated entry in an account book does not bind the debtor.⁵ The court may have regard not only to the debtor's express intimation but also to circumstances "implying that the payment is to be applied to the discharge of some particular debt".⁶ Thus, where a particular debt was to be liquidated by the payment of grain, this was evidence of appropriation towards that particular debt which was to be repaid in kind and the creditor was not entitled to appropriate such payment towards debts which were not to be liquidated in the same manner.⁷ If there is, on the one hand, a clear debt and, on the other, an unacknowledged demand, any payment made by the debtor is to be attributed to the payment of the debt.⁸ "Where one of several partners dies and the partnership is in debt

19 *Foster v. Chetty Firm*, 2 Rang 204; *Croft v. Lumley*, 6 HLC 672: (1843-60) All ER Rep 162.

20 *Radha v. Anu*, 1934 A 386.

1 *Chegganmull v. Manicka*, 50 MLJ 242 but see *Ram v. Chiranj*, 57 A 605.

2 *Relu Mal v. Ahamad*, 7 Lah 17; see S. 60 n. 2.

3 19 IC 849, *referred to in Raja Mohan v. Nisar*, 164 IC 945.

4 *Govind v. Narayan*, 1945 N 277.

5 *Chegganmull v. Manicka*, 50 MLJ 242; *Leeson v. Leeson*, (1936) 2 KB 156: (1936) 2 All ER 133.

6 *Mohim v. Kalitara*, 11 CWN 939, the provisions of the section distinguished from those of S. 59 of the Bengal Tenancy Act; *Nash v. Hodgson*, 25 LJ Ch 186.

7 *Sungut v. Baijnath*, 18 C 164.

8 *Burn v. Boulton*, 15 LJ CP 97; see *Kirkpatrick v. S. A. Insurance Co.*, 11 AC 177.

and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt".⁹ If there be an express provision in a bond for the application of any payment made under it to the payment of interest, any payment made by the debtor would be regarded as payment of interest.¹⁰ An accused paying a sum into court is entitled to ask that the money should be appropriated by the court towards any particular fine.¹¹

3. **Application of the section.**—The section does not apply to where money coming into the hands of the plaintiff does not belong to the defendant or where the payment is not made by the debtor to the creditor.¹² Ss. 59 and 60 contain a codified statement of the general law which is applicable to transactions in relation to the payment and realisation of Government revenue. As the Privy Council has observed the sections "might perhaps have had some bearing upon the case".¹³ The section has also been applied to a debt under the Public Demands Recovery Act and it has been held that a collector has no authority to appropriate payments made in liquidation of specific arrears of road cess towards previous arrears.¹⁴ The rule does not apply to a decree payable in instalments. Therefore a debtor is not entitled to appropriate a payment to any particular instalment that he chooses but the decree-holder is entitled to appropriate the payment to the instalments in order of priority.¹⁵

60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

1. **The section.**—The section shows that a debt is not extinguished by becoming barred by lapse of time but may be insisted on for certain purposes.¹⁶ The creditor cannot appropriate a payment towards a claim to which he is not entitled.¹⁷

9 *Simson v. Ingham*, 2 B & C 65, 72; *Hooper v. Keay*, 1 QBD 178, cited in *Bishun v. Siddique*, 1 Pat LJ 474: 35 IC 375.

10 *Gopi v. Hardeo*, 31 A 285.

11 *Yakoob v. Emperor*, 132 IC 475.

12 *Krishnaswami v. Natesa*, 124 IC 51; *Waller v. Lacey*, 9 LJ CP 217: 133 ER 245.

13 *Mahomed v. Ganga*, 38 C 537, 541 PC; *Jogendra v. Uma*, 35 C 66; see *Dasharathi v. Khondkar*, 55 C 624; *Lal Behary v. Rajendra*, 43 CLJ 468, 578.

14 *Nandon Missir v. Lala Harakh*, 14 CWN 607.

15 *Harkisondas v. Nariman*, 104 IC 673; *Hanmant v. Raghavendra*, 24 Bom LR 410; *Faaal v. Jiwan*, 3 ALJ 430.

16 *Nursing v. Hurryhur*, 5 C 397.

17 *Lamprell v. Guardians*, 18 LJ Ex 282.

2. **Time of appropriation by the creditor.**—There is no obligation upon the creditor to make the appropriation at once, but once it is made and communicated to the debtor, he has no right to appropriate it otherwise.¹⁸ If the debtor does not make any appropriation at the time when he makes the payment the right of appropriation devolves on the creditor. The creditor is not bound to appropriate at the time of payment as is the rule of civil law,¹⁹ or within a reasonable time,²⁰ but he has the right of election “up to the very last moment” and is not bound to declare his intention in express terms. He may declare it by bringing an action or in any way that makes his meaning and intention plain. When once the creditor has made an appropriation and communicated it to his debtor, he will have no right to appropriate it otherwise.¹ What is “the last moment” must depend on the circumstances of each case. If the rights of third parties do not intervene, a creditor may retain the right of appropriation until the time of trial when he is examined as a witness.² Therefore the limits to the exercise by the creditor of the option to appropriate, if he has done nothing which puts an end to this option, are (1) the communication of the appropriation to the debtor, or (2) the bringing of an action,³ or (3) even until judgment has been pronounced by the court, for then S. 61 comes into operation.⁴

The English law as regards the time for the exercise of the creditor's right to appropriate has been recognised by the High Courts of Bombay,⁵ Patna,⁶ Lahore⁷ and Madras.⁸ A different view, however, has been taken by the High Court of Allahabad. There it is stated that what the Indian law has done by Ss. 59-61 is to adopt the rule of civil law with certain modifications. Accordingly, an appropriation of payment must be made by the debtor at the time of payment and by the creditor at the time of receiving the money, otherwise S. 61 would be meaningless.⁹ The Allahabad view can no longer be maintained in view of the decision of the Judicial Committee in the case of *Commissioner of Income-tax v. Maharaja of Darbhanga*.¹⁰ It is now well settled that if the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor, who

18 *Rama v. Lal*, 1940 PC 63.

19 *Clayton's case*, 1 Mer (608): (1814-23) All ER Rep 1.

20 *Simson v. Ingham*, 2 B & C 65, 75: 107 ER 307.

1 *Cory Bros. v. The 'Mecca'*, 1897 AC 286; (1895-99) All ER Rep 933, fold in *Manisty v. Jameson*, 5 Pat 326; *Albemarle Supply Co. v. Hind & Co.*, (1928) 1 KB 307, 313: (1927) All ER Rep 401; *Friend v. Young*, (1897) 2 Ch 421; *Ram v. Chiranji*, 57 A 605.

2 *Seymour v. Prickett*, (1905) 1 KB 715.

3 *Smith v. Betty*, (1903) 2 KB 317; but see *Kunja v. Karuna*, 60 C 1265; *Seymour v. Prickett*, (1905) 1 KB 715.

4 *Gajram v. Kalyan*, 84 ALJ 1224 FB; Halsbury, 4th ed. vol. 9 para 506.

5 *Amerchand & Co. v. Ramdas*, 38 B 255, 265 FB.

6 *Dishum Perakash v. Siddique*, 1 Pat LJ 474.

7 *Relu Mal v. Ahamad*, 7 Lah 17, authorities reviewed.

8 *Munisami v. Perumal*, 37 MLJ 367.

9 *Kundan Lal v. Jagannath*, 37 A 649, criticised in *Relumal v. Ahamad*, 7 Lah 17.

10 12 Pat 318.

may exercise that right until the very last moment and need not declare his intention in express terms. So long also as notice has not been given as to the appropriation of any amount to any account it is open to the creditor to alter it and make a re-appropriation.¹¹

3. Evidence of appropriation.—The creditor's right to appropriate arises when "the debtor has omitted to indicate to which debt the payment is to be applied".¹² Thus, where a tenant failed to establish that he made a payment to his landlord either with an express limitation or under circumstances implying that it was a payment in respect of arrears of rent, the landlord was entitled to apply the sum at his discretion to any debt due to him.¹³ The original reluctance of the mortgagor to pay any compound interest at all has nothing whatever to do with the appropriation by the creditor.¹⁴ Accounts rendered are evidence of the appropriation of payments to the earlier items, but may be rebutted by evidence to the contrary.¹⁵ Thus, where a debtor owed moneys to his creditor on two accounts, namely, a debt of £5,000 under a guarantee and a discount transaction, payments were made by the debtor exceeding the sum of £5,000 and shown by the creditor in his account, *held*, the advance under the guarantee could not be considered as satisfied.¹⁶ In the case of current accounts for goods supplied or work done when a balance is carried forward as in the case of banking accounts it is reasonable to hold, in the absence of special circumstances, that the earlier items of debt are extinguished by the earlier items of credit.¹⁷ A creditor, however, cannot credit a payment received in the general balance of account in the sense of saving limitation for each item.¹⁸

4. Any lawful debt though barred.—Where there are several distinct debts the creditor has the discretion under the section to apply the payment to any debt, even though barred by limitation.¹⁹ Where there has been no express appropriation by the parties, the court has got to see whether there was any intention of the parties to appropriate it to a particular debt.²⁰ In the absence of any stipulation to the contrary and of any appropriation by the debtor, a creditor can appropriate a payment to a debt which is not guaranteed instead of to one for which he has a surety.¹ A bank has no right to appro-

11 *Imperial Bank v. Avanasai*, 53 M 826; *Kunja v. Karuna*, 6 C 1265.

12 See *Sungut v. Baijnath*, 13 C 164.

13 *Jwala v. Mathura*, 152 IC 786.

14 *Rameswar v. Mahomed*, 36 C 39.

15 *Henniker v. Wigg*, 4 QB 792.

16 *City Discount Co. v. Mc. Lean*, LR 9 CP 692; see *Kirkpatrick v. S. A. Insurance Co.*, 11 AC 177 Eq 767.

17 *Albemarle Supply Co. v. Hind*, (1928) 1 KB 307; (1927) All ER Rep 401; *Jibanram v. Sagarmal*, 145 IC 611.

18 *Abdul v. Munna*, 19 ALJ 555.

19 *Gajram v. Kalyan*, 34 ALJ 1224 FB; *Friend v. Young*, (1937) 2 Ch 432; *Re Foster*, 20 Eq 767.

20 *Shyam v. Raghunath*, 170 IC 480.

1 *Re Sherry*, 25 Ch D 692; *City Discount Co. v. Mc. Lean*, LR 9 CP 692; *Sankararama v. Ponnuswami*, 49 IC 273; *Kuckreja v. Alam*, 1941 L 16; *Kinnaird v. Webster*, 10 Ch D 189; 27 ER 212.

appropriate an amount due under a fixed deposit receipt issued in favour of two persons and payable to either or the survivor of them towards a debt due to it by one of those persons alone.² When a person has two demands upon another, one arising out of a lawful contract, the other out of a contract forbidden by law, and the debtor makes a payment which is not specifically appropriated by either party at the time of payment, the law will appropriate it to the debt recognised by law.³ Although a solicitor cannot maintain an action in England to recover the amount of his bill of costs from a corporation in the absence of a retainer under seal, yet the appropriation of the money paid by the corporation cannot be questioned.⁴ The creditor may appropriate to any particular debt, or to any particular portion of a running account, even though the claim may have become barred.⁵ A creditor has no right to appropriate a payment against unliquidated damages, when no interest was in fact running under any contract, express or implied.⁶ Where the plaintiff sold goods to the members of a joint family and continued to do so after the separation of one of the members and payments were made by the unseparated members, the plaintiff had the right to appropriate the payment so made as against a barred debt prior to the separation.⁷ A creditor cannot claim the benefit of S. 20 of the Limitation Act unless he can show that the payment was made on account of interest as such. There must either be some express declaration by the debtor or there must be circumstances from which such an intention on the part of the debtor may be inferred.⁸ As has been said, if money be paid on a general account without a definite appropriation on the part of the debtor, no part of the money can be said to have been paid for interest as such for the purpose of saving limitation.⁹ Though a creditor has an undoubted right to appropriate a payment made by a debtor, he has no right to assent in respect of one debt and dissent in respect of another, where a debtor owes him two separate debts.¹⁰

5. Appropriation towards interest.—When there is a debt that carries interest, apart from any specific appropriation by the debtor, the rule is well established that in ordinary cases the money is to be first applied in the payment of interest, and then, when that is satisfied, in payment of capital.¹¹ A creditor appropriating first towards the principal and not interest is not bound

2 *Simla Banking Co. v. Bhagwan*, 111 IC 554, headnote.

3 *Wright v. Laing*, 2 B & C 165.

4 *Arnold v. Borough of Poole*, 12 LJ CP 97; (1835-42) All ER Rep 188.

5 *Bishun Perakash v. Siddique*, 1 Pat LJ 474; *Jibanram v. Sagarmal*, 145 IC 611; *Nash v. Hodgson*, 25 LJ Ch 186, the same rule applies in case of interest.

6 *Shiva v. Prayag*, 61 C 711, 779.

7 *Krishna v. Kalinath*, 41 IC 421.

8 *Bitari v. Kanji*, 19 CWN 237.

9 *Narain v. Chandra*, 120 IC 825, *referred to in Lalji v. Ghasiram*, 128 IC 276.

10 *Dunlop Rubber Co. v. Haigh*, (1937) 1 KB 347.

11 *Venkatadri v. Parthasarathi*, 44 M 570 PC; *Parr's Banking Co. v. Yates*, (1898) 2 QB 460 cited; *Rai Bahadur v. Radha*, 26 CWN 153 PC; *Maharaja of Benares v. Harnaram*, 28 A 25; *Sarsuti v. Ethisham*, 77 IC 310, 326; *Akbar v. Attar*, 1945 PC 170; *Bennison v. Shiber*, 1946 PC 145; *Shanmugam v. Anna*, 1950 FC 38; *Harish chandra v. Kailash chandra*, AIR 1975 Raj 14, 20.

by the mistake.¹² The rule applies to appropriation of payments to interests on decretal debts, it is immaterial whether the decree is an instalment decree or a decree of any other kind.¹³ But where a debtor in making a payment stipulates that it is to be applied only to the principal, the creditor need not accept the money on those terms; if he does, he will be bound by the appropriation proposed by the debtor.¹⁴ A claim for interest against a surety is a claim apart from that on the principal.¹⁵

61. Application of payment where neither party appropriates.—Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

1. **The section.**—The section is an enabling section which entitles the court to declare that such payments shall be appropriated in the discharge of debts in order of time.¹⁶ This section was applied in deciding the case of *S. M. Misrimall v. K. Radhakrishnan*.¹⁷ There the defendant had dealings with the plaintiff which consisted of the plaintiff advancing money in respect of goods imported by the defendant. Such goods were sold by the defendant to the plaintiff for an agreed rate and the invoice was credited to the account of the defendant. In the day book and ledgers these debits and credits were entered seriatim, there being no instruction of the defendant to appropriate the moneys in any particular way. The plaintiff pleaded that the suit was not barred by limitation by reason of adjustment of credits made towards prior amounts due. Held that the debts were discharged in the order of time by the credits, whether or not they were barred by limitation. In the absence of anything to show that a repayment was towards any particular item the court is entitled to appropriate it towards the earliest outstanding item irrespective of its being in time or not.¹⁸ Thus, where a broker contracting for a principal, not named, bought several goods and delivered them to the principal, on a general account without any specific appropriation, on the broker becoming insolvent, *held*, the payment ought to be apportioned as between the

12 *Muni v. Gulab*, 1933 L 126.

13 *Biswanath v. Someswar*, 21 CWN 1055; *Luchmeswar v. Lutfi*, 8 BLR 110 PC; *Mokhtar v. Rahimunnissa*, 67 IC 606.

14 *Nemi Chand v. Radha Kishen*, 48 C 839 PC; *Rai Bahadur v. Radha*, 26 CWN 153 PC.

15 *Rup v. Nand*, 1935 L 334.

16 *Bishun v. Siddique*, 1 Pat LJ 474; *Kundan v. Jagannath*, 37 A 649; *Amrit v. Sundar*, 78 IC 910.

17 AIR 1972 Mad 108.

18 *Dulichand v. Soni*, 90 IC 239; *Shiva v. Prayag*, 61 C 711; *Clayton's Case*, 1 Mer 572; (1814-23) All ER Rep 1; *Re Stenning* (1895) 2 Ch 433; *A. Ramaval v. P. Automobiles*, AIR 1973 Mad 359.

several owners of the goods, who were entitled to recover the difference only from the buyer.¹⁹ The principle underlying the section applies even when there is one debt consisting of two parts, one due from the debtor personally and another from him in a representative capacity.²⁰

Contracts which need not be performed

62. Effect of novation, rescission and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an agreement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract, B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

1. **Novation.**—The section is confined to cases of novation. It has no bearing on the assignability of a contract,¹ nor does it deal with a case of part performance. Where parties take no steps to carry out the terms of the new contract, there is no novation. To such a case S. 39 applies.² Nor does it refer to a provision in a contract that it may be altered at the instance of one party alone.³ It does not affect the operation of S. 6 of the Santal Parganas Settlement Regulation III of 1872.⁴ The section is but a legislative expression of the common law of England: "It is competent to the parties to a contract at any time before breach of it by a new contract to add to, subtract from, or vary the terms of it or altogether to waive and rescind it".⁵ Novation is a term derived from Civil Law and it means this—that there being a contract in existence some new contract is substituted for it either between the same parties or between different parties, the consideration being the discharge of the old contract.⁶ In a suit based on novation of a contract a plaintiff must prove (1) the existence of liability under the original contract, and (2) the

¹⁹ *Favenc v. Bennett*, 11 East 36: 103 ER 917.

²⁰ *Ram v. Chiranji*, 57 A 605.

¹ *Tod v. Lakshmidas*, 16 B 441, 449.

² *Babulal v. Tulsi*, 184 IC 705.

³ *Benode v. G. A. Society*, 1950 C 232.

⁴ *Debi v. Kusum*, 10 Pat 63, see as to rules of damdupat.

⁵ *Manohar v. Thakur Das*, 15 C (326).

⁶ *Scarfe v. Jardine*, 7 AC 345, 351: (1881-85) All ER Rep 651.

extinguishment of that liability by the new contract.⁷ The essence of the novation of a contract lies not in the dissimilarity of the terms between the old contract and the new but in the intention of the parties to supersede the old by the new.⁸ Novation of a contract implies a fresh contract, directly or by implication, in place of the original contract.⁹ An acknowledgment of liability does not amount to a novation.¹⁰ Novation cannot be compulsory so as to make the person supplying the goods accept against his will the liability of another person to pay for them in substitution for the liability of the original purchaser.¹¹ Before there can be a novation under the section there should be an actual substitution of the old contract by the new. Till the second contract contemplated is brought into existence, the old contract will exist and continue to be enforceable. A new agreement that would be in future a substitution would be insufficient to wipe out an existing liability.¹² The consideration for the new contract is the discharge of the old. If the new agreement be unenforceable it is not a contract and therefore cannot serve as a novation.¹³ Or, the new contract may be conditional, if it be not performed rights under the original contract shall revive.¹⁴ There is no novation on the giving of a collateral security for an existing debt and the creditor is not deprived of the right to recover the debt.¹⁵ A personal obligation to repay remains when a mortgage deed turns out to be invalid.¹⁶ If the drawer of a *hundi* is not a party to its mortgage, the mortgage does not operate as a novation of the original contract so as to absolve the drawer from liability. There is no merger of the *hundi* in the mortgage.¹⁷ If the original contract has ceased to exist a fresh contract is necessary.¹⁸ A judgment extinguishes a contract which is merged in the former.¹⁹ The acknowledgment of a barred debt does not constitute a novation.²⁰ A decree in discharge for a debt due by instalments may be a valid consideration for the execution of a mortgage. The plaintiff having elected to enforce his rights under the decree is not pre-

7 *Shiba v. Tincouri*, 183 IC 855; Halsbury, 4th ed., Vol. 9, Para 639.

8 *Baldeo v. Sher*, 74 IC 42; *Kshetra v. Harsukdas*, 102 IC 871; *Bhabuti v. Parbati*, 155 IC 534; *Hukum v. Jeth*, 1944 S. 205; *Shiba v. Tincouri*, 1939 P 477.

9 *Gopal v. Ramadhar*, 82 IC 204; *Kedar v. Kripal*, 1944 O 63; *Shiba v. Tincouri*, 183 IC 855.

10 *Madho v. Gouri*, 183 IC 179.

11 *Kemp v. Bearselman*, (1906) 2 KB 604.

12 *Angan Lal v. Saran*, 51 A 799; *Dhanpat v. Niamat*, 1933 L 335; *Roushan Bibes v. Hurray Kristo*, 8 C 926; *Ganpat v. Mahadeo*, 85 IC 264, *refing to Commercial Bank v. Jones*, 1893 AC 181; *Nadimulla v. Channappa*, 5 Bom LR 617; *Nundo v. Ramsookhee*, 5 C 215; *Abdul v. Bahadur*, 14 Bom LR 26; *Guranditta v. Ladhu*, 1936 Lah 476.

13 *Ganpat v. Mahadeo*, 85 IC 264; *Shankar v. Amba*, 1946 N 280.

14 *Re Neil*, 16 Ch D 675; 44 LT 25.

15 *Suraj v. Baldeo*, 18 IC 701.

16 *Ram v. Odindra*, 15 CLJ 17.

17 *Loader v. Chartered Bank*, 21 IC 222.

18 *Phoenix Mills v. Madhavadas*, 24 Bom LR 142.

19 *Tetya v. Bapu*, 7 B 330.

20 *Badri v. Besu*, 1933 L 174.

cluded from enforcing the mortgage.¹ An agreement to substitute a new contract must be executed in the same manner as the original contract, S. 92, Evd. Act.² On a second deed as novation of the first, the consideration is the rescinding of the obligation under the first.³

Whether there is an agreement to substitute a new contract or not is a question of fact depending on the intention of the parties.⁴ A contract of service being incapable of transfer unilaterally, such transfer from one employer to another can only be effected by a tripartite arrangement between the employer, the employee and the third party, i.e., by novation when an employer orders his employee to do a certain work for another person, the employee still continues to be in his employment even if his wages for such work is paid by that another person.⁵ The use of words 'the original contract need not be performed' implies that its performance could still be required.⁶ The true rule seems to be that one should look to the substance of the matter and not to the mere form. If a creditor has not been actually paid but he takes a renewed bill or promissory note for his debt in order to give time to the debtor and receives some consideration by way of increased interest or otherwise for his forbearance, it can hardly be said that the old debt was paid off by the acceptance to the renewed bill.⁷ A surrender of a lease in consideration of the grant of a new one does not take effect where the new lease is invalid.⁸ Where a surety under a bond to Government for the treasurer of a collectorate executed a new bond each year after the accounts had been examined, *held*, there was no novation.⁹ If the new contract be unenforceable for any reason, e.g., for lack of registration, then a new contract cannot be said to be substituted for the old, so that the old contract remains unaffected.¹⁰ So also a suit on the original contract is maintainable where the new contract is conditional and the condition is not fulfilled.¹¹ A party excused from performance cannot force upon the other a substituted performance.¹²

As has been observed, "in order that one liability may be extinguished by being replaced by another agreement, it is essential that the person on whom the correlative right resides would be a party to the agreement or should, at all events, show by some act of his own that he accedes to the substitution."¹³

1 *Karuppan v. Ponnuswami*, 11 IC 837.

2 *Saga v. Ramjee*, 1942 P. 105.

3 *U. San v. P. R. Firm*, 1936 R 396.

4 *Nelson & Sons v. Nelson Line*, 1908 AC 108, 113: (1904-07) All ER Rep 244; *Kishen v. Gohli*, 1938 L 757.

5 *P. K. P. Bidi Factory v. O. L. Thenge*, AIR 1970 SC 823, 827.

6 *New S. Bank v. Probodh*, 1942 C 87.

7 *Kshetranath v. Harsukdas*, 81 CWN 703.

8 *Doe v. Courtney*, 17 LJQB 151.

9 *Lala Banshidhar v. Government of Bengal*, 9 BLR 364, 368.

10 *Nundo v. Ramsookhee*, 5 C 215; *Abdul v. Bahadur*, 14 Bom LR 26; *Nathu Ram v. Dogar Mal*, 4 Lah 198; *Rahmat v. Dewa*, 4 Lah 151; *Thadi v. Medapati*, 1941 M 772 EB.

11 *Prem v. Mohammad*, 162 IC 882.

12 *Brooke Toole Mfg. Co. v. Hydraulic Gears*, 89 LJ KB 288; 122 LT 128 DC.

13 *Lindley, Partnership*, 6th Ed. p. 246 cited in *British Homes Assurance v. Paterson*, (1902) 2 Ch 404.

It is obvious however that if a contract is clear, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct may in certain events raise the inference that the parties have agreed to modify their contract, but cannot have the effect of changing the operation of an unambiguous agreement. It may support, along with other evidence, a claim for rectification.¹⁴ A contract need not be rescinded by an express agreement to that effect, a new agreement inconsistent with the terms of the old will have the effect of discharging the old agreement.¹⁵ Thus where a simple bond was executed for the balance due under a previously executed mortgage bond, there was substitution of a new contract and the original contract need not be performed.¹⁶ A suit for the recovery of a debt is not maintainable so long as a promissory note stands (in the name of a *benamidar*) under which the maker of the note remains liable to the holder thereof.¹⁷

The High Court of Calcutta has held that there can be no novation after a breach of the original contract.¹⁸ The above view has given rise to dissentient judgments in *Ramiah v. Somasi*,¹⁹ and a view inconsistent with that of the Calcutta High Court has been laid down in a later case.²⁰ But a settlement of a claim arising out of a breach of a contract stands on a different footing. Thus, where after the breach of a contract the parties agreed to accept a settlement of their claims for damages on the basis of a scheme which was laid down by a committee, the parties were bound by the scheme and could not fall back on the original contract.¹ Where a debtor and a creditor enter into a new agreement regarding the debts, and the agreement is partly performed by the parties, the creditor cannot file a suit upon the original debts, but he may put an end to the new contract on account of the debtor's default under S. 39.² All the parties to the old contract must also be parties to the new. Thus, the renewal of a promissory note by some of the executants of the old note does not amount to a novation. The executants of the old note who are parties to the new are liable to contribute to those of the latter who have paid the debt even though the debt has become barred against some of them.³ Novation may arise not only by change of parties [as in illust. (a)] but may consist in the extinguishment of an old debt by the substitution of another and a different agreement [as in illust. (b)] equally accepted by both parties.⁴ Novation may constitute a good consideration for a promise.⁵ Where

14 *Ottoman Bank v. Chakarian*, 172 IC 786 PC.

15 *Raghumull v. Luchmondas*, 20 CWN 708; *Mathura v. Ram*, 20 CWN 370.

16 *Rajdhar v. Mohan*, 29 ALJ 223.

17 *Srikrishna v. Sitanath*, 41 CWN 1283.

18 *Manohar v. Thakurdas*, 15 C 319, 325, but see *Brijmohan v. Mahabeer*, 63 C 194.

19 29 MLJ 125.

20 *N. M. Firm v. Theperumal*, 45 M 180.

1 *Ram v. Mannu*, 45 A 472.

2 *Ahmad v. Ram*, 1939 N 224.

3 *Venkatanarayana v. Lakshmi-bayamma*, 116 IC 129; *Prem v. Mohammad*, 162 IC 882; *Ramasami v. Katayya*, 48 M 693; *Loader v. Chartered Bank* 22 IC 222.

4 *Muhammad v. Sarrute*, 1883 AWN 253; *Gouri v. Madho*, 1943 PC 147.

5 *Gouri v. Madho*, 1943 PC 147.

the holder of a promissory note payable on demand demanded payment on a certain day when the maker paid interest in advance up to a later date on condition that the holder should not make any demand until the later date, the transaction amounted to the substitution of a new contract for that contained in the promissory note and limitation began to run from the later date.⁶ A transaction which amounts to a novation is not void as a transfer of an actionable claim.⁷

Where the clause in a settlement in express terms declared that the earlier contracts should be finally concluded in terms of the settlement and no party would have any claim against the other, it was held that the substituted agreement gave a new cause of action and obliterated the earlier ones.⁸ If one contract is substituted by another contract by way of novation, a clause for arbitration in the original contract perishes along with the contract.⁹

2. By change of parties.—The section covers cases in which the liability of a debtor to pay his original creditor is extinguished because of a new contract by which he has made himself liable to a third person. The debtor, it is well established, cannot transfer his liability without the consent of the creditor.¹⁰ So also if at the request of a creditor a debtor undertakes to pay the debt to a third party a new contract is substituted in place of the old and the creditor cannot recover from the original debtor.¹¹ Where A is indebted to B, B to C, B asks A to pay to C, there is a valid assignment of the debt.¹² "A common instance of it (novation) in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liability of the business, usually taking over the assets".¹³ Where the creditor pursuant to a tripartite agreement releases the debtor from liability and accepts another person as his debtor, the original debt is extinguished by novation.¹⁴ On a change of partnership after dissolution of a firm, a customer who has no knowledge of the dissolution may hold the old partners liable, credit being given to them, or he may hold the new partners liable. The two principles are not capable of being brought into play together so as to make both the old and the new partners liable. When once there has been an election to do one of two things it is final and conclusive.¹⁵ When there is a change in a firm of which a person trading with it has notice, and he goes on dealing with the new and afterwards seeks to make the old firm liable, a question arises whether by his conduct he has not

6 *Natha v. Janardhan*, 1 Bom 503.

7 *Jivraj v. Lalchand*, 139 IC 582.

8 *Union of India v. Kishorilal*, AIR 1959 SC 1362.

9 *Dadai Cement Co. v. Bird & Co.*, AIR 1974 Delhi 223.

10 *Seetharama v. Narayanaswami*, 47 IC 749, as to transfers of choses in action see S. 130, T. P. Act.

11 *Ganpati v. Jaiaram*, 81 IC 1019.

12 *Crowfoot v. Gurney*, 9 Bing 372: (1824-34) All ER Rep 91.

13 *Searf v. Jardine*, 7 AC 845: (1881-85) All ER Rep 651; *Bilborough v. Holmes*, 5 Ch D 255.

14 *Jethmal v. Hirulal*, AIR 1972 Raj 220, 224-25.

15 *Searf v. Jardine*, 7 AC 850, 860: (1881-85) All ER Rep 651.

discharged the old firm and adopted the liability of the new. "A very little will do to make out an assent by the creditors to the agreement".¹⁶ On an amalgamation of two insurance companies the acceptance by a policyholder of bonus from the new company effects a novation of his contract of insurance, so that he can no longer be a creditor of the old company.¹⁷ It is settled law that when a creditor of a firm contracts or agrees with a new firm to take their security in discharge of that of the old, the retiring partner is discharged of any liability to pay the debt, but whether such a contract has or has not taken place is a question of fact. The mere acceptance of a note or bill from the surviving partner in itself is not enough. Novation is another word for accord and satisfaction by giving in substitution the liability of another person upon another contract in lieu of the contract for which the former parties were liable. It appears that a contract to discharge a retiring partner from a debt due from the firm may be proved either by express agreement or by facts and conduct from which it may fairly be inferred.¹⁸ There may be novation of part of a contract, the original agreement so far as it is inconsistent with the supplemental agreement is rescinded.¹⁹

When a contract is made between A and B, and B subsequently takes C into partnership and gives A notice thereof, A may elect to abide by the original contract with B alone or adopt the liability of the new firm. If he elect to abide by his original contract with B, C will not be liable for a fraud committed by B against A.²⁰ Where there is an old firm and either a new partner is taken into it or a new firm constituted and the assets are taken over by the new firm, when a customer knowing all these circumstances, afterwards goes on and deals with the new firm, there is no doubt whatever that it may be inferred from slight circumstances an assent on his part to accept the new firm as his debtors.¹

3. Agreement to alter original contract.—It is not for the court to alter an existing contract. The contract is the contract of the parties. It lies on those who seek to alter the instrument and not on those who support it to show why it should not be altered.² An alteration of a contract requires the consent of both parties. A company cannot by altering its articles justify a breach of the contract.³ So long as a contract is executory, one party is not in a position to avoid it without the consent of the other.⁴ Still less will a plaintiff suing on an instrument, on which he founds his right, be allowed to say that it does

16 *Rolfe v. Flower*, LR 1 PC 27; *Hobson v. Cowley*, 27 LJ Ex 205; *Re Internal L. I. Agency*, LR 9 Eq. 316; *Re Cocker's case*, 3 Ch D 1.

17 *Spencer's Case*, LR 6 Ch 362.

18 *Markand v. Virendrarai*, 19 Bom LR 837, 843, *Re Head*, (1893) 3 Ch 426 *reft.* to; but see *Re Head*, (1894) 2 Ch 236.

19 *Dawson v. Brinckman*, 3 Mac & G 53: 42 ER 181 LC.

20 *British Homes Assurance v. Paterson*, (1902) 2 Ch 404.

1 *Re Smith Knight & Co.*, LR 4 Ch 662: 38 LJ Ch 673.

2 *Tucker v. Bennett*, 38 Ch D 1, 9.

3 *Baily v. British Equitable Assurance*, (1904) 1 Ch 374, 386: (1904-07) All ER Rep 592.

4 *Narayan v. Moti*, 37 Bom LR 215, 219.

5 *Druff v. Parker*, LR 5 Eq 131.

not express the real agreement into which he has entered.⁵ Where upon an agreement a tenant was liable for rent and repair, and by a later agreement he was liable for rent only, the later agreement was in substitution of the former.⁶ An executor is competent to enter into an arrangement which will be binding upon the estate, converting a partnership firm, of which the deceased was a member, into a limited liability company.⁷ If there be an original contract to carry goods according to the maund rate, the railway company would not be entitled to alter that agreement and charge wagon rate,⁸ nor even where there has been an undercharge by an agent of the railway company.⁹ Where accounts between a creditor and his debtor were stated, and the former in order to consolidate and secure the debt took a bond from the latter, a new contract came to subsist between the parties in supersession of the account stated; on the account stated a suit therefore will not lie.¹⁰ But a suit will lie on an account stated if the subsequent bond is required by law to be registered and is not registered.¹¹ When a settlement contract is made reselling the goods back again from the original buyer, the intention is that the two contracts should stand together, so that after a settlement contract the original contract is not utterly discharged.¹² It cannot be said that the legal effect of entering into cross contracts is to extinguish the first contract altogether, but each of these independent contracts is a separate contract and continues to be in full force.¹³ A payment may be made by a mere transfer of figures in an account without any money passing or by giving receipts pursuant to an arrangement. The onus of proving waiver is on the person who alleges it;¹⁴ waiver must be an intentional act with knowledge. By a mere extension of time for delivery of goods there is no such alteration of the original contract as to operate as a rescission, therefore an arbitration clause in a contract remains enforceable. But the arbitration clause may be withdrawn if a new term is introduced which substantially alters the other terms of the original agreement.¹⁵

In case of a dispute if there is a reference to arbitration the finding of the arbitrators amounts to "accord and satisfaction by substituted agreement" which extinguishes the prior rights of the parties¹⁶ If on novation the fresh contract provides for the consequences of its breach the liability under the old

6 *Moore v. Marrable*, LR 1 Ch 217.

7 *Jamesetji v. Hirjibhai*, 37 B 158, 167.

8 *B. B. C. I. Ry. v. Budh*, 21 ALJ 830; *Chunni v. N. G. S. Ry.*, 29 A 228; *Allauddin v. G. I. P. Ry.*, 14 ALJ 494; *Gulab v. G. I. P. Ry.*, 48 A 217.

9 *Chhotey Lal v. R. K. Ry.*, 1932 A 540.

10 *Sirdar Kuar v. Chandrawati*, 4 A 330.

11 *Har Chandi v. Sheoraj*, 44 IA 60; see *Kiamuddin v. Rajjo*, 11 A 13; *Bhagatram v. Harjas*, 112 IC 719.

12 *Uttam Chand v. Jewa*, 46 C 534, 542.

13 *Kishindas v. Menghraj*, 81 IC 834, *Uderam v. Shivbhajan*, 22 Bom LR 711 fold.

14 *Rolland v. Cassidy*, 13 AC 770, 778, reff. to in above; see *Duke of Leeds v. Ankerst*, 15 LJ Ch 351, 41 ER 886.

15 *Lachminarain v. Hoare Miller*, 41 C 35.

16 *Payana v. Pana*, 18 CWN 617 PC.

contract is dissolved.¹⁷ When in the exercise of execution proceedings parties arrive at an arrangement providing for the payment of the decretal amount by instalments and, on default, for the payment of the whole amount then remaining due, the new agreement is enforceable and does not amount to a supersession of the decree.¹⁸ Where a contract was entered into for the construction of a building to be completed within a year, subject to a commission in favour of the owner, but radical changes were ordered by the owner doubling the size of the building, and the altered building could not be completed within a year, the owner was not entitled to a claim over the commission.¹⁹ Where under a charterparty the shipowner had the whole of June to furnish a vessel, on the 3rd he intimated that the vessel would be ready on or about the 12th, but she was not ready till the 23rd, on the 18th the charterer repudiated the contract, the owner had the whole of June for the performance of his contract which was not varied by mentioning the 12th as the probable date when the vessel would be ready to receive the goods.²⁰ It is doubtful how far the provisions of this Act will apply to cases of transfers of property. Where a later mortgage deed, of which a part of the consideration was the money due on an earlier mortgage, was held invalid, the mortgagee was entitled to sue on the earlier.¹

When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor on account of the debt; if it be not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration. But when the original cause of action is the bill or note itself, and does not exist independently of it, *e.g.*, when in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at 6 months' date, there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties; if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money.^{1a} A promissory note given for a void consideration is void. Thus where a sum under a decree is paid out of court, and not recorded in court as required by O. 21, r. 2, C. P. C., the agreement is void. A promissory note given in per-

17. *Ram v. Tekchand*, 146 IC 562.

18. *Ganga v. Murlidhar*, 4 A 240.

19. *Sahu v. Muhammad*, 26 Bom LR 631 PC.

20. *Boyle v. Martin*, 16 B 389.

1. *Kankaiya v. Hamidan*, 1938 All 714.

1a. *Sheikh Akbar v. Sheikh Khan*, 7 C 256, fold in *Achuta v. Jagannadham*, 64

formance of the agreement is also void.² If a bill or promissory note be given for a contemporaneous debt, there is a difference of opinion, but the better opinion is that even in such a case the bill or note merely suspends the remedy and does not operate as a discharge. Therefore, if the bill or note turn out to be invalid the lender can fall back upon the original contract, express or implied, arising from the loan. S. 91 of the Evidence Act does not abrogate the well-settled rule of English law that a negotiable instrument operates only as a conditional discharge.³ When a bill or note is given for the price of goods sold and delivered, the presumption is that it is only a conditional payment with a recourse to the original consideration. Where there is an independent admission of a loan, the holder of a *hundi*, bill or note, which is defective and inadmissible in evidence, for want of a stamp, may still sue on the original consideration,⁴ because an implied contract to repay money lent arises from the fact that the money is lent, therefore it is recoverable even though no express promise either written or verbal is made to repay it.⁵ In cases of novation if the contemplated substituted contract fails, *prima facie*, the parties cannot be taken to have intended that the liability of the debtor under the original contract would also cease.⁶ The acceptance of a *hundi* therefore operates as a conditional payment, the right to sue on the original cause of action revives if the *hundi* be dishonoured,⁷ unless a creditor, instead of taking cash, prefers to take a bill.⁸ Where there is already a completed cause of action for recovery of money for a distinct and independent transaction and a promissory note is given as collateral security, the plaintiff will be entitled to sue on the original consideration even if the promissory note be inadmissible in evidence. But this cannot be done where the promissory note and the handing over of the money are part and parcel of the same transaction and

MLJ 79; *Yarlagadda v. Gorantla*, 29 M 111; *Nathu Ram v. Dogar Mall*, 4 Lah 198; *Domoo v. Arshad*, 146 IC 471 FB; *Janaka v. Sheo Charan*, 135 IC 390; *Sundar v. Puran*, 67 IC 856; *Angad v. Srinath*, 3 IC 403; *Hidayat v. Naga*, 24 IC 721; *Dargavarapu v. Rampratap*, 25 M 580; *Subramanian v. Muthia Chetty*, 35 M 639; *Venkata v. Lakshmi*, 116 IC 129; *Prem v. Mahammad*, 162 IC 882; *Harjasmal v. Bhagatram*, 155 IC 15.

2 *Heera v. Pestonji*, 22 B 693.

3 *Chinnayya v. Srinivasa*, 156 IC 250, conflicting rulings refd. to; see *Chokkalingam v. Anna*, 34 IC 417; *Cohen v. Hale*, 3 QBD 371; 47 LJQB 496.

4 *Krishnaji v. Rajmal*, 24 B 360; *Rahmat v. Dewa*, 75 IC 827; *Sundar v. Puran*, 67 IC 856; *Maung Kyi v. Gale*, 54 IC 84 FB; *Ismail v. Purbhu*, 112 IC 254; *Nathusa v. Phule*, 14 IC 399; *Saligram v. Radhay*, 29 ALJ 522; *Nazir v. Ram*, 29 ALJ 64 FB; *Anup v. Mahesh*, 172 IC 744; *Ram v. United Refineries*, 9 R 56; *E. B. C. Bank v. Surendra*, 39 CWN 1235; *Brijbhusan v. Ram*, 1932 P 324; *Gura v. Tangi*, 1932 M 687.

5 *Pramatha v. Dwarka*, 23 C 851; *Gulabgir v. Nathmal*, 1932 N 23.

6 *Abdul v. Bahadur*, 14 Bom LR 26; *Kiamuddin v. Rajjo*, 11 A 13; *Durai v. Krishniah*, 54 IC 318; *Gharati v. Kehar*, 170 IC 120.

7 *Kuttayan v. Palaniappa*, 27 M 540; *Wegg v. Evans*, (1895) 1 QB 108; *Sayer v. Wagstaff*, 5 Beav 415; *Re Romer*, (1893) 2 QB 286; *Dawar v. Sohan*, 1937 L 816.

8 *Anderson v. Hillies*, 21 LJ CP 150; *Everett v. Collins*, 2 Camp 515.

the terms of the loan are the very terms of the promissory note.⁹ An agreement in alteration of a promissory note payable on demand to be valid must be founded on a consideration.¹⁰ An agreement in writing accompanying a promissory note, which agreement postpones the time for payment, is a valid and enforceable agreement.¹¹

The above rules have been thus summed up after a consideration of numerous authorities in a Full Bench case of the Rangoon High Court¹²:—

(1) When a loan is contracted it is an implied term of the agreement that the loan shall be repaid. (2) When a promissory note or bill of exchange is given by the borrower to the lender in connection with the loan, either at the time when the loan is contracted or afterwards, the terms upon which it is given and taken is a question of fact and not of law. (3) It is *prima facie* to be presumed (although the presumption is rebuttable) that the parties to the loan transaction have agreed that the promissory note or other negotiable instrument given and taken in such circumstances shall be treated as conditional payment of the loan; the cause of action on the original consideration for money lent is suspended during the currency of the negotiable instrument so long as the rights of the parties under the instrument subsist and are enforceable; but the cause of action to recover the amount of the debt revives if the negotiable instrument is dishonoured or the rights thereunder are not enforceable. On the other hand, the cause of action on the original consideration is extinguished when the amount due under the negotiable instrument is paid, or if the lender, by negotiating the instrument or by laches or otherwise, has made the bill his own, and thus must be regarded as having accepted the negotiable instrument in satisfaction of the borrower's liability on the original consideration. (4) If a promissory note or other negotiable instrument be given by the borrower to the lender and the negotiable instrument be itself the consideration for the loan, or if the promissory note or other negotiable instrument be accepted as an accord and satisfaction of the original debt, the lender is restricted to his rights under the negotiable instrument, by which he must stand or fall; for in the one case the note or bill itself is the original consideration and on the other, the original debt has been liquidated by the acceptance of the negotiable instrument. (5) If it is agreed between the parties that the promissory note or other negotiable instrument shall be taken merely as collateral security for the repayment of the loan, the lender is entitled to sue upon the original consideration independently of the security and without

9 *Nazir v. Ram*, 29 ALJ 64 FB fold in *Tarachand v. Tamijuddin*, 39 CWN 1241; *Bally v. Bhugwan*, 23 IC 975; *Harjasmull v. Bhagatram*, 155 IC 15; *Ananda v. Pundalik*, 167 IC 673—S. 91 Evidence Act may be a bar; but see *Ralli v. Caramalli*, 14 B 102 (case of sold notes); *Kunwar v. Suraj*, 139 IC 298 FB; *Lal v. Gulam*, 1933 N 57; *Chaudhari v. Lal*, 1933 A 109; *Official Assignee v. Kuppu*, 1936 M 785 FB.

10 *Mc Manus v. Bark*, LR 5 Ex 65; 39 LJ Ex 65.

11 *Annamalai v. Velayuda*, 29 M 129 FB, overruling *Somasundaram v. Narashimha*, 29 M 212; *Simon v. Hakim*, 19 M 368, foling *Salmon v. Webb*, 3 HLC 510; *Ramswami v. Murugiah*, 1936 M 179 FB.

12 *Maung Chit v. Roshan*, 12 R 500 FB; see *Perumal v. Kamakshi*, 1938 Mad 933.

regard to any rights that he may possess under the negotiable instrument. (6) Further, if the terms of the agreement under which the loan was made have been embodied in a negotiable instrument or in any other document, no evidence can be adduced in proof of the terms of the contract except the document itself, or secondary evidence of the contents of the document in cases where such evidence is admissible. It follows, therefore, that in such cases if the document which contains the whole of the terms of the agreement be not admissible in evidence, a suit to recover the amount of the loan must fail, because the plaintiff is not in a position to prove the debt.

A mere acceptance of a substituted mode of performance,¹³ or the postponement of performance at the request of one party,¹⁴ does not amount to a new contract varying the original agreement.¹⁵ Where novation is not pleaded but all the facts are before the court, it will decide the matter in dispute.¹⁶

4. **Agreement to rescind.**—Where there is a clear intention to rescind, as distinguished from an intention to vary, the old contract will be rescinded. Intention to abandon a contract may be manifested by conduct, *e.g.*, by a total cessation of intercourse and correspondence after a promise to marry.¹⁷ Rescission of a contract can only be by mutual consent. Until such consent has been given each party has a right to draw back.¹⁸ The renewal of cohabitation puts an end to the provisions of a separation deed.¹⁹ An intending marriage settlement and the contract to marry were held to be at an end by the parties cohabiting and having children before the marriage.²⁰ Acceptance of rent after giving notice of forfeiture amounts to a waiver of forfeiture.¹ Contracts have been held to be rescinded by lapse of time,² or by waiver or acquiescence in its breach.³ Similarly, the omission to perform certain acts incumbent upon a party to a contract may justify the other party in coming to the conclusion that, in point of fact, the party guilty of the omission intends to abandon the contract and is himself treating it as abandoned, and rescinding it.⁴

If a contract prescribing a particular mode of repayment fails, the primary obligation can still be enforced, provided the transaction is not one in which

13 *Leather Co. v. Hieronimus*, LR 10 QB 140.

14 *Ogle v. Vane*, LR 3 QB 272; *Hickman v. Haynes*, LR 10 CP 598.

15 *Darnley v. L. C. & D. Ry.*, LR 2 HL 43; see *Vasudeva v. Veleppa*, 45 IC 401.

16 *Bin v. Manuel*, 1936 R 358.

17 *Davis v. Bomford*, 30 LJ Ex 139; *Bond v. Wallford*, 32 Ch D 238.

18 *Heinskey v. Earle*, 8 E & B 410; *Leigh v. Paterson*, 8 Taunt 540; *Johnstone v. Milling*, 6 QBD 460.

19 *Nicol v. Nicol*, 31 Ch D 524: (1886-90) All ER Rep 297.

20 *Essery v. Cowlard*, 26 Ch D 191. The burden of proving that a contract of marriage has been rescinded by mutual agreement lies on the defendant. Silence, absence, conduct, expressions in letters may in certain circumstances be sufficient, *Jacob v. Wills*, 89, IC 824 PC.

1 *Davenport v. The Queen*, 3 AC 115, 131, fold in *Kali v. Fuzle*, 9 C 843.

2 *Rushbrook v. Lawrence*, LR 5 Ch 3.

3 *Kelsey v. Dodd*, 52 LJ Ch 34.

4 *Morgan v. Bain*, LR 10 CP 15.

the consideration was forbidden by law or opposed to public policy.⁵ A new contract, which is not enforceable, may not effect a variation of an old contract, or amount to novation, but may amount to a rescission of the old contract, provided there is the manifest intention in any event of a complete extinction of the first and formal contract.⁶ In the absence of any intention to rescind there will be no implied rescission of the original contract.⁷ There may be rescission of part of a contract.⁸ Thus, an extension of the time of insurance has the effect of maintaining the contract but varying one term of it only.⁹ A contract is not rescinded if the time for performance is extended at the request of the promisor.¹⁰

Whether there has been a mere variation in terms or a rescission depends upon the facts of each particular case and is often not easy to determine.¹¹ See the test of distinction laid down in *Morris v. Baron & Co.*¹² In order that there may be a rescission of the old contract there must be a clear and precise evidence of a mutual intention. What is needed to be proved is an express abandonment of the old contract. Without evidence of abandonment the rights under the old contract cannot be taken away.¹³ One contract is rescinded by another between the same parties when the latter is inconsistent with and renders impossible the performance of the former; but if, though they differ in terms, their logical effect is the same, the second is merely a ratification of the first and the two must be construed together. A rescission of a contract implies that the parties are relegated to the original position they were in before the contract was made; that cannot be where a part of the original contract has already been performed. It is also well settled that the court insists upon clear and precise evidence of a mutual intention to determine or abandon the contract. Thus the demand for the return of the deposit money is not by itself conclusive evidence of an intention to abandon the contract.¹⁴ The mere fact of one party alleging that a new contract has been substituted for an old one does not of itself put an end to the old contract even as against the party so alleging unless the allegation is proved to be true.¹⁵ When on novation the defendant refuses to carry out the new contract, the plaintiff is entitled to rescind it and revert to his previous consideration.¹⁶ Under a

5 *Ram v. Ram*, 66 IC 680.

6 *Morris v. Baron & Co.*, 1918 AC 118; *B. W. Glover & Co. v. S. I. Coal Co.*, (1938)1 KB 408.

7 *British & Beningtons Ltd. v. N. W. Cachar Tea Co.*, 1923 AC 48; (1922) All ER Rep 224.

8 *Hunt v. S. E. Ry. Co.*, 45 LJ CP 87.

9 *Royal Exchange Assurance v. Hope*, (1928)1 Ch 179; (1927) All ER Rep 67.

10 *M. Sham Singh v. State of Mysore*, AIR 1972 SC 2440, 2443.

11 *B. N. Ry. v. Ratanji*, 62 C 175.

12 1918 AC 126.

13 *Ganpat v. Mahadeo*, 85 IC 264, refig. to *Mathura v. Ram*, 43 C 790; *Har Chandi v. Sheoraj*, 39 A 178 PC.

14 *Ganpat v. Mahadeo*, 85 IC 264.

15 *Kalidas v. Giribala*, 23 IC 360, *Roushan v. Hurray*, 8 C 926 fold.

16 *Najaf v. Rangu*, 66 IC 47.

contract for a lump sum to do a piece of work nothing can be recovered unless the work be fully executed, as the contract is entire.¹⁷ In *Appleby v. Myers*¹⁸ it has been laid down that only under two conditions a contractor for a lump sum who has not performed the stipulated work can recover something under his contract. He can do so if he has been prevented by the defendant from performing his work, or if a new contract has been made that he shall be paid for work he has actually done. A settlement between the parties that a certain sum of money was payable by one party to the other for the breach of a contract is not a new contract, no novation of the contract.¹⁹

5. **Effect of novation.**—Novation operates as an absolute release of the original debtor. Thus, where a creditor released his principal debtor and accepted another as debtor, and the surety for the former debtor agreed to give a guarantee for the latter and to continue his former guarantee but died without actually giving the guarantee, the Privy Council observed: "It may be taken as settled law that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished."²⁰ A party's liability under an old contract does not continue under the new if there is no provision to that effect.¹ Novation, therefore, discharges a party from the obligation under the old contract. A clear and specific contract admitted between the parties supersedes altogether the original contract, but not where the new contract is challenged.² Thus, where a suit on a second *hundi* is not maintainable, because it is insufficiently stamped, the creditor can fall back on the prior *hundi* and this section is no bar to his doing so.³ A mere agreement to substitute a new contract does away with the necessity for the performance of the earlier one.⁴ Where the loan is independently of the note, a suit would lie on the loan.⁵

Novation not only discharges a party but puts an end to the old contract, so that the new or the modified contract takes its place;⁶ no suit, therefore, can be founded on the original contract.⁷ The fact that a document does not contain all the terms of a contract is not of itself sufficient to enable a party to sue on the original consideration without producing the document.⁸ An agreement varying the terms of a subsisting contract cannot be enforced as satisfaction of the contract unless the agreement is acted upon. Until satis-

17 *Sinclair v. Bowles*, 9 B & C 92; *Roberts v. Havelock*, 3 B & Ad 404; 41 Digest (Repl) 391, 1778.

18 LR 2 CP 651, 661; *Forman v. The Ship Liddesdale*, 1900 AC 190, 202; *Small v. Middlesex Real Estate*, 1921 WN 245.

19 *Kamal v. Bani*, 75 IC 440.

20 *Commercial Bank v. Jones*, 1893 AC 313.

1 *Ram v. Tekchand*, 1933 L 464.

2 *Kiamuddin v. Rajjo*, 11 A 13; *Syed Ahmad v. Ram*, 1939 N 224; *Madho v. Gouri*, 1939 P 323.

3 *Rahmal v. Dewa*, 4 Lah 151; *Nathu Ram v. Dogar Mal*, 4 Lah 198; see, ante.

4 *Syed Ahmad v. Ram*, 1939 N 224.

5 *Indu v. Lakshmi*, 1935 C 102.

6 *Roushan v. Hurray Kristo*, 8 C 926.

7 *San Ya v. P. R. Firm*, 165 IC 388; see ante; *Rameshwar v. Pirthi*, 1939 L 266.

8 *Mung Ko v. Maung Lee*, 1937 R 61.

faction is made the original contract remains in tact.⁹ If a creditor has a cause of action for recovery of money, for which his debtor has executed a promissory note, and the cause of action is independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence. Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed.¹⁰

6. **Alteration of registered agreement by parol agreement.**—Evidence of any oral agreement or of the conduct of the parties to rescind a registered agreement is excluded by S. 92(4) of the Evidence Act.¹¹ Where a contract is required by law to be in writing, any variation of its terms must also be in writing by reason of S. 92 of the Evidence Act.¹² Although an oral agreement cannot be pleaded in order to rescind or cancel a registered agreement yet it may be given in evidence of a new transaction¹³ or of the satisfaction of a claim.¹⁴ Thus the payment of a smaller amount under a parol agreement than the rent fixed by a registered agreement will discharge the lessee, although the parol agreement is not admissible in evidence.¹⁵

7. **Alteration of documents.**¹⁶—Neither this Act nor any other statute for the matter of that contains any provision as to the effect of alteration of a document. The principle of English law, first laid down in *Pigot's case*,¹⁷ that the material alteration of a document by a party to it after its execution without the consent of the other parties renders it void, has been followed in India.¹⁸ The essence of the rule laid down in *Pigot's case*¹⁹ and in *Master v. Miller*²⁰ is not that the law prohibits the variation of the terms of one contract by another, but that it is not possible to alter the form of an instrument in a material respect so that the instrument itself, as altered, has lost its identity with the instrument in its original form. Additional words written on a paper which also contains a promissory note, if made with the consent of the parties, leaves the validity of the instrument unimpaired.¹ The principle has been extended to (1) negotiable instruments or promissory notes,² (2) to bought and

9 *Keshab v. Hossein*, 18 IC 847.

10 *Harish Chandra v. Ganga Singh & Sons*, AIR 1974 Punj 156, 158.

11 *Srimivasaswami v. Athmarama*, 32 M 281; *Mayandi v. Oliver*, 22 M 261; but see *Sanderson v. Graves*, LR 10 Ex 234; 44 LJ Ex 210.

12 *Shib v. Gulab*, 160 IC 676.

13 *Rakhmabi v. Tukaram*, 11 B 47.

14 *Maung Pu v. Po*, 6 Rang 191.

15 *Karampalli v. Thekku*, 26 M 195.

16 Halsbury, 4th ed. vol. 9, paras 597-599, 601.

17 9 Rep 206, 11 Rep 27a.

18 *Atmaram v. Umedram*, 25 B 616; *Kalee v. Gunga*, 10 WR 250 a case before the the Act was passed; *Gogun v. Dhuronidhur*, 7 C 616; *Surendra v. Krishna*, 43 CWN 191 (kobala for sale).

19 11 Rep 27a.

20 100 ER 1042, 1 Sm LC 780.

1 *Joharmal v. Chettyar Farm*, 14 R 29.

2 *Master v. Miller*, 1 Sm LC 781.

sold notes,³ (3) to guarantees,⁴ (4) to cases of alteration by adding a party.⁵ All these cases are collected in *Suffell v. Bank of England*.⁶ Whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue upon it or to defend himself by using it as a direct defence.⁷ When a bill is materially altered it is discharged. The law does not allow the party claiming under it to fall back upon the contract as it existed prior to the alteration.⁸ A person is prevented from setting up a contract for his own benefit if he has altered it, but the document may determine the rights of the other party, at any rate it may be looked at to see the terms of the contract.⁹ A party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. The alteration of a once signed paper will vitiate it.¹⁰ If bought and sold notes are falsified, a party can establish his contract by other evidence.¹¹ The rule applies to documents which are the foundation of the plaintiff's claim and not merely the evidence of the defendant's pre-existing liability.¹² The alteration must also be material and of course made without the consent of the other party.¹³ Insertion of the words 'clear the debts and execute the sale deed free from encumbrance' after its execution does not amount to material alteration so as to cancel it.¹⁴ If an entry relating to interest be interpolated in a *hatchita*, but no interest be claimed in the suit, the plaintiff is entitled to recover the principal amount.¹⁵

The unauthorised alteration of an instrument does not render it void for all purposes; the altered instrument may be used as proof of some right or title created by or resulting from it.¹⁶ Thus, a lessee altering a lease may lose the benefit of a term, yet the instrument may be admissible to show the amount of arrears of rent due.¹⁷ The question as to the effect on the right of a mortgagee by a material alteration in the security bond after its execution has been fully discussed in *Mangal Sen v. Shankar*,¹⁸ and it has been held that a

3 *Powell v. Divet*, 15 East 29.

4 *Davidson v. Cooper*, 13 M & W 343 (making an instrument appear as a deed), fold in *Bank of Hindostan v. Smith*, 36 LJ CP 241.

5 *Gardner v. Walsh*, 24 LJ QB 285, fold in *Gogun v. Basiram*, 9 CIR 257.

6 9 QBD 555, 561; see argument of Counsel in *Ananda v. Ananda*, 44 C 159.

7 *Joharmal v. Chettyar Farm*, 14 Rang 29.

8 *Ram v. Gulab*, 55 IC 610.

9 *Pattinson v. Luckley*, LR 10 Ex 330; *Rajdhar v. Mohan*, 29 ALJ 223, 131 IC 593.

10 *Davidson v. Cooper*, 13 LJ Ex 280; *Gogun v. Dhuronidhar*, 7 C 616.

11 *Durga v. Bhujan*, 6 Bom LR 498.

12 *Atmaram v. Umedram*, 25 B 616; *Ward v. Lumley*, 29 LJ Ex 322.

13 *Gomti v. Meghraj*, 31 ALJ 907; see cases reld. to; see *Kamla v. Hasan*, 184 IC 149; *Waugh v. Bussell*, 5 Taunt 707: (1814-23) All ER Rep 47; *Crediton v. Exeter*, (1905) 2 Ch 455: (1904-07) All ER Rep 552.

14 *Kalinna v. Palani Gounder*, AIR 1970 SC 1942.

15 *Harendra v. Uma*, 9 CWN 695.

16 *Paramma v. Rama*, 7 M 302; *A. C. Insee. v. Fitzgerald*, 20 LJ QB 244: 117 ER 944: 16 QB 432.

17 *Hitchins v. Scott*, 2 M & W 809

18 25 A 580.

suit does not lie upon the instrument in its altered form.¹⁹ An altered deed, whereby an interest in land became vested, was admissible in evidence on behalf of the grantee to show the estate which passed under it. Therefore the vested interest of the prior mortgagee was not divested by the alteration in the security, so he was entitled to the sum which might actually be found due to him on the footing of the security.²⁰ The rule is well settled that an altered instrument cannot be relied on as the foundation of the right or liability which is sought to be enforced. It bars a suit (1) where the instrument is of the essence of the transaction, as under the Registration Act, or (2) where the instrument is the only mode of proof prescribed by any Act, or (3) where the right sought to be enforced is one resting in contract or covenant and not a vested interest. The rule is not applicable when (i) the suit is based on some antecedent transaction for which the instrument was given as a security, or (ii) a right or title or legal relation is created and becomes a vested interest from the instrument having been executed, and the duty sought to be enforced attaches to it either from the operation of the law or of any Act.¹ An alteration in a deed by some of the signatories before execution is immaterial so far as those who have signed are concerned if it does not affect their interest.² Of course, different considerations would apply in a case where the alteration is authorised.³

To constitute an alteration material it is enough that if the instrument were genuine it would operate differently from the original. What alteration is material must depend upon the nature of the instrument as also upon the change.⁴ Where in a printed contract form in English the buyer entered the specification of the goods in a vernacular language which was at variance with the specification written in English, and the contract form provided that anything except the buyer's signature written in a vernacular language would be null and void, *held*, the writing in vernacular might be ignored.⁵ The rule tends to prevent the party in whose custody the document is from attempting to make any alteration in it. The instrument is declared void because it is no longer the same instrument. An alteration made in good faith to carry out the original intention of the party does not vitiate the instrument.⁶

What amounts to a material alteration depends upon the nature of the alteration in each particular case. The important question is whether the

19 *Gangaram v. Chandan*, 4 A 62; *Gogun v. Dhuronidhur*, 7 C 616; *Sitaram v. Daiji*, 7 B 418; *Christacharlu v. Karibasayya*, 9 M 399; *Suffell v. Bank of England*, 9 QBD 555, *refd. to*.

20 *Stewart v. Aston*, 8 Ir CLR 35; *Ramasamy v. Bhavani*, 3 MHC 247; *West v. Steward*, 14 M & W 47: 153 ER 383.

1 *Christacharlu v. Karibasayya*, 9 M 399 FB; *Subrahmania v. Krishna*, 23 M 137; see *Gour v. Prasanna*, 33 C 812; *Sheo v. Babau*, 1937 A 439.

2 *Doe v. Bingham*, 4 B & Ald 672: (1814-23) All ER Rep 540.

3 *Liladhar v. Ravji*, 68 MLJ 530 PC.

4 *Krishna v. Nagendrabala*, 34 CLJ 333.

5 *Meghraj Durga*, 54 C 97.

6 *Master v. Miller*, 4 TR 320, 1 Sm LC; *Gour v. Prasanna*, 33 C 812; *Dodge v. Pringle*, 29 LJ Ex 115, *Pachkodi v. Krishna*, 1947 N 145.

integrity and identity of the contract have been changed.⁷ What alterations are material is a question which has frequently been considered by English Courts. The most authoritative decision is that of the Court of Appeal in *Suffell v. Bank of England*.⁸ It has never been held in England that an alteration which does not directly or indirectly affect the nature or operation of the contract, or the identity or effect of the document, or the obligations of the contracting parties, but goes only to the proof of its execution is a material alteration.⁹ If the alteration cause the instrument on the face of it to operate differently from the original it is a material alteration.¹⁰ Regard must be had to the particular instrument in order to see what its purport is and what its office is.¹¹ An alteration which cannot possibly prejudice anyone does not destroy the validity of the instrument.¹² An alteration made under a mistake of fact does not avoid an instrument.¹³

An alteration of the number on a bank note,¹⁴ or of the date of a bill of exchange after acceptance whereby the payment will be accelerated,¹⁵ or the addition in it of words 'payable at A',¹⁶ or of a promissory note whereby the time for bringing a suit will be extended,¹⁷ or of a joint promissory note in a joint and several one,¹⁸ or of the date of a deed,¹⁹ or of the date in a surety bond by a person in whose favour it has been passed,²⁰ or of the time of sailing of a vessel,²¹ or of the subject of insurance¹ in a policy, is a material alteration and avoids the instrument. The addition of a new name, as an executant, on a promissory note or bond after it has been completed,² or the alteration by the erasure of words, e.g., of the words "or order" in a promissory note,³ discharges the defendant from liability. Alteration in a mortgage bond changing the rate of interest and inserting a condition making the entire sum payable upon default of any instalment,⁴ or making out that a larger share of property

7 *Gour v. Prasanna*, 33 C 812; *Pachkodi v. Krishna*, 1947 N 145.

8 9 QBD 555, see cases reft. to.

9 *Mohesh v. Kamini*, 12 C 313; *Sitaram v. Daiji*, 7 B 418 disst. from; *Hemchand v. Govind*, 86 IC 185.

10 *Oodeychand v. Bhaskar*, 6 B 371; *Hemchand v. Govind*, 86 IC 185; *Kanhyalal v. Sitaram*, 81 IC 847.

11 *Re Howgate's Contract*, (1902)1 Ch. 451.

12 *Crediton, Bishop v. Exeter, Bishop*, (1905)2 Ch 455: (1904-07) All ER Rep 552.

13 *Raper v. Birkbeck*, 15 East 17: (1803-13) All ER Rep 394.

14 *Suffell v. Bank of England*, 9 QBD 555.

15 *Master v. Miller*, 1 Sm LC; *Tahilram v. Blackwell*, 19 IC 616; *Clifford v. Parker*, 10 LJCP 227.

16 *Burchfield v. Moore*, 23 LJQB 261.

17 *Govindasami v. Kuppusami*, 12 M 239.

18 *Perring v. Hone*, 4 Bing 32.

19 *Crediton v. Exeter*, (1905)2 Ch 455: (1904-07) All ER Rep 552.

20 *Namdee v. Swadeshi Mandali*, 28 Bom LR 944.

21 *Fairlie v. Christie*, 7 Taunt 416: 129 ER 166.

1 *Langhorn v. Cologan*, 4 Taunt 330.

2 *Gardner v. Walsh*, 5 E & B 83; *Gogun v. Dhuronidhur*, 7 C 616.

3 *Lakshammam v. Narasinha*, 38 M 746.

4 *Christacharlu v. Karibasayya*, 9 M 399 FB.

was hypothecated,⁵ prevents the plaintiff from suing on the bond. A cheque materially altered is avoided and a bank if negligent in honouring such a cheque, therefore, must pay the money over again to the customer.⁶ The addition of the words "of their own manufacture" by the buyer is a material alteration.⁷ On an amendment of an award by an arbitrator the award will be set aside.⁸

The correction of the Christian name, the mistake having been originally made in inadvertence,⁹ or the addition of the Christian name in a power of attorney,¹⁰ or the alteration of a figure in the margin of an instrument,¹¹ does not invalidate it. The alteration of a document of sale by the seller by the insertion of a clause excepting a claim on a former account was held not so material as to defeat his claim for the recovery of the price of goods sold.¹² A man may convert a blank endorsement into a special endorsement in his own favour,¹³ but on the special endorsement he cannot insert the rate of exchange.¹⁴ The addition of the description of immovable property, mentioned in a document presented for registration, is not material, though registration has been refused for the lack of these particulars.¹⁵ Where the number on an accidentally mutilated bank note after it was pieced together was missing the note continued to be valid.¹⁶ The addition of an attestation clause does not affect the terms of the contract between the parties,¹⁷ nor does the interpolation of the name of an attesting witness in a document which need not be attested invalidate it.¹⁸ An alteration only expresses the effect of the instrument as it originally stood, *e.g.*, the insertion of the words 'on demand' in a promissory note does not affect its validity.¹⁹

A person is prevented from setting up a contract for his own benefit if he has altered it. The disability is on the person who has altered it. The other party if he wants to assert his rights under the contract may do so.²⁰ If a written contract is materially altered by one party he is not entitled to damages for breach of contract but is entitled to the repayment of the advance made by him.¹ An altered instrument may be void for the purpose of taking an

5 *Gangaram v. Chandan*, 4 A 62, commented in *Mangal v. Shankar*, 25 A 580, 604.

6 *Slingsby v. Dist Bank*, (1932)1 KB 544: (1931) All ER Rep 143.

7 *Mollett v. Wackerbath*, 17 LJCP 47; *Powell v. Divett*, 15 East 29: 104 ER 755.

8 *Sutherland & Co. v. Hannevig Bros.*, (1921)1 KB 336: (1920) All ER Rep 670.

9 *Re Howgate's Contract*, (1902)1 Ch 451.

10 *Eagleton v. Gutteridge*, 12 LJ Ex 359; see *Wood v. Slack*, LR 3 QB 379.

11 *Garrard v. Lewis*, 10 QBD 30.

12 *Vena Mana v. Kuppusami*, 3 MLJ 366.

13 *Clark v. Pigott*, 12 Mod 193.

14 *Hirschfield v. Smith*, LR 1 CP 353.

15 *Abdool v. Goolam*, 30 B 304.

16 *Hong Kong & Shanghai Bank v. Lo Lee*, 1928 AC 181.

17 *Ramayyar v. Shanmugan*, 15 M 70.

18 *Mohesh v. Kamini*, 12 C 313; *Venkatesh v. Babu Subraya*, 15 B 44; see *Ramayyar v. Shanmugan*, 15 M 70.

19 *Aldous v. Cornwell*, LR 3 QB 573; *Hall v. Fuller*, 5 B & C 750.

20 *Pattinson v. Luckley*, LR 10 Ex 330; *Chitturi v. Boddu*, 28 IC 57.

1 *Anantha v. Surayya*, 43 M 703.

interest under it but may be admissible to prove a collateral fact.² A person altering a promissory note executed in satisfaction of a prior note cannot fall back upon the original consideration nor can rely on the altered note as an acknowledgment to save the bar of limitation.³ A note may be sued upon if destroyed by accident provided sufficient remains to establish its identity and the necessary elements that rendered it valid.⁴ Where a suit is brought on the provisions of a document which has been fraudulently altered, an application to amend the plaint in order to enable the plaintiff to sue on the document in the original state cannot be entertained.⁵

An alteration which is wholly immaterial will not invalidate a document and preclude a party from legally relying upon it. Although a document will be invalidated when an alteration in a material particular is made in it with the privity and knowledge of the person relying upon it or having custody of it, still it will not be invalidated in every case if the alteration be made in fraud of him and against his will;⁶ nor will a document be invalidated by alteration where the document is merely evidence of the defendant's pre-existing liability and not the foundation of the plaintiff's claim.⁷ An alteration made in good faith to carry out the original intention of the parties, *e.g.*, where there was an accidental omission, does not vitiate the instrument.⁸

Thus, where in an instrument containing the terms, "one rupee per mensem on a loan of Rs. 200," the mortgagee added the words, "per cent," after the word "rupee," this being the intention of the parties, in making this alteration effect was given to the common intention of the parties, therefore, the instrument was not affected by the alteration.⁹ Where a contract provides for the performance of two distinct and separate acts, an unauthorised alteration in the contract as to one of them does not rescind the contract with regard to the other.¹⁰ An alteration by mistake does not affect a contract. Thus, the mere fact of a bank cancelling the signature of the maker of a dishonoured promissory note and writing 'paid' on it, but corrected before the note was returned with a memorandum, "cancelled in error," cannot be effectual to charge the bank with the receipt of the money.¹¹ Where there was a several bond, the obligees by removing the seal of one obligor did not render it void as to the others.¹²

2 *Hutchins v. Scott*, 2 M & W 809.

3 *Bindeshry v. Pergas*, 179 IC 890.

4 *Honkong & Shanghai Bank v. Lo Lee*, 1928 AC 186.

5 *Christacharlu v. Karibasayya*, 9 M 309; *Gogun v. Dhuronidhur*, 7 C 616, 619.

6 *Lowe v. Fox*, 12 AC 206, 216.

7 *Sandhura v. Kehr*, 169 IC 229.

8 *Carris v. Tattersall*, 10 LJCP 187; *Gour v. Prasanna*, 33 C 812; *Ananda v. Ananda*, 25 CLJ 155; *Krishna v. Nagendrabala*, 34 CLJ 333; *Waugh v. Byssell*, 5 Taunt 707; (1814-23) All ER Rep 347; *Lachmi v. Srideo*, 1939 ALJ 46.

9 *Ananda v. Ananda*, 44 C 154.

10 *Harrison v. Seymour*, LR 1 CP 518.

11 *Prince v. Oriental Bank*, 3 AC 325, 332: (1874-80) All ER Rep 769.

12 *Collins v. Prosser*, 1 B & C 682: (1814-23) All ER Rep 143.

13 *Doe v. Cattomore*, 20 LJQB 364; *Re Spollen & Long's Contract*, 1936 Ch 713: (1936) 2 All ER 711.

The presumption of law is that an erasure or interlineation in a deed was made before the execution of such deed.¹⁴ Where a party sues on an instrument which has been manifestly altered, it is for him to show that the alteration was not improperly made,¹⁴ unless the alteration was immaterial.¹⁵

A party is sometimes entitled to succeed on the original consideration and to rely upon the altered bond as embodying an acknowledgment sufficient to save the bar of limitation.¹⁶ Then there is the technical rule that the original debt itself may be destroyed by a fraudulent alteration of the instrument. There is a well-recognised distinction between the effect of an alteration of an executory contract and an alteration of a contract which is fully executed.¹⁷ In the first case, the rights under the instrument are gone; in the second, the title vested by the executed instrument remains unaffected by any subsequent alteration, as the alteration does not by itself revest the title in the original owner.¹⁸

63. Promisee may dispense with or remit performance of promise.—Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A without ascertaining the amount gives to B, and B, in satisfaction thereof, accepts the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

1. The section.—The section does not apply where the parties stand in the position of a decree-holder and judgment debtor and not in that of promisor and promisee.¹⁹ S. 55 of the Insolvency Act overrides this section in an insolvency matter. Thus the remission of a debt without consideration is a 'voluntary transfer' and is contrary to the insolvency law.²⁰ S. 45 gives a right

¹⁴ *Henman v. Dickinson*, 5 Bing 183.

¹⁵ *Falmouth v. Roberts*, 11 LJ Ex 180: (1835-42) All ER Rep 369.

¹⁶ *Motilal v. Monmohan*, 5 CWN 56.

¹⁷ See *Subramania v. Krishna*, 23 M 137; *Mangal v. Shankar*, 25 A 580.

¹⁸ *Gour v. Prasanna*, 33 C 812.

to every joint promisee to claim performance of the promise; that being so, one joint promisee cannot dispense with or remit, wholly or in part, the performance of a promise, much less can he enter into a new contract with the promisor to take the place of the old contract so as to bind the other joint promisee. It is not right to apply the English common law wholesale without reference to the Indian statute law on the point.¹ It has been said that the section is intended not only to apply to cases where the whole contract has been supplanted by a new one but also to cases where the old contract subsists and there is a voluntary remission of performance of some promise in it, *e.g.*, a remission of a part of a debt at the time it becomes payable. The section will not be extended to cover the case of a binding promise to dispense with or remit performance in the future unless that waiver is made the subject of a fresh contract.² Under the section there is nothing to prevent a discharge by acceptance of something in lieu of the performance of the contract. The original contract remains but what will be a breach of it is treated as if there has been no breach. Waiver may be evidenced by conduct inconsistent with the continuance of the rights waived.³ There must be a promise before there can be dispensing with or remission of it.⁴ The word waiver is at times loosely used with varying signification. Waiver depends on evidence of facts and is not an issue which an Appeal Court can deal with unless evidence has been given in the lower court.⁵ An obligation to pay the dower is a debt and so can be released under this section.⁶ Acceptance of a proposal for reduction of a claim is not an agreement, but the compromise falls under this section.⁷ When a claim revives, the revival is subject to this section.⁸

Where a debtor sends a letter to the creditor with a cheque for an amount smaller than what is due stating in the letter that the cheque is sent in full and final settlement of account and the creditor accepts the cheque informing the debtor that he has accepted the cheque in part payment of his dues, he is entitled to claim the balance of the amount.

The sending of a cheque for a smaller amount along with a letter to the effect that it was in full settlement does not amount to a discharge of the entire debt, nor does it amount to payment or tender of the amount on any condition that acceptance of that amount is in full and complete discharge of the entire debt. Further, the fact of keeping the cheque is not conclusive in law. The entire matter is a question of fact. The Court has to find out the true character

19 *Debendra v. Sourindra*, 24 IC 391.

20 *Official Assignee v. Kanniah*, 58 M 702; *Vuppalapali v. Official Receiver*, 1940 M 787.

1 *Arunachalam v. Ramaswamy*, 112 IC 501.

2 *Vaidyanatha v. Kanadappa*, 132 IC 292.

3 *Kawadaji v. Gangaram*, 64 IC 461.

4 *W. L. I. Inace v. Sita*, 1944 N 122. As to whether the original cause action is discharged or not, see *Jammu v. Murti*, 1946 N 148.

5 *Edridge v. Sethna*, 38 CWN 145 PC; see *Vaidyanatha v. Kandappa*, 132 IC 292.

6 *Nurunnessa v. Mahammud*, 31 CLJ 14.

7 *Venkata v. Pancha*, (1947) 1 MLJ 226.

8 *Sabaldas v. Sobhokhan*, 1948 S 91.

of the transaction, the real intention of the parties and the correct and essential transaction between the parties.⁹ Acceptance under protest of payment in full satisfaction of the amount due under a contract is no accord or satisfaction in the sense of bilateral consensus of intention and does not discharge the contract so as to disentitle the person accepting payment to enforce the arbitration clause.¹⁰

The defendant, the Prince of Berar, had executed in 1937 a promissory note in favour of the plaintiff for a sum of Rs. 13 lakhs and odd rupees due on account of purchase of jewellery from the plaintiff. After the military occupation of Hyderabad, the Princes Debt Settlement Committee set up by the Military Governor decided that the plaintiff should be paid a sum of Rs. 20 lakhs in full satisfaction of his claim of Rs. 27 lakhs under the notice. The Government also made it clear that unless full satisfaction was recorded payment would not be made. The plaintiff after some initial protests agreed to accept the sum of Rs. 20 lakhs in full satisfaction of his claim and duly discharged the promissory note by endorsement of full satisfaction and received the payment. He then brought a suit against the defendant for recovery of the balance of Rs. 7 lakhs. It was held that the case was completely covered by S. 63, Contract Act, and illustration (c) thereof and the plaintiff having accepted payment from a third person, *viz.* the Government, in full satisfaction of his claim was not entitled to sue the defendant for the balance in view of S. 41 of the same Act.¹¹

2. English law.—The section not only modifies but is in direct antagonism to the law of England. It was laid down in an old case¹² that payment of a smaller sum in satisfaction of a greater cannot be any satisfaction for the whole. This rule has been followed, not without reluctance, by the House of Lords in *Foakes v. Beer*.¹³ There it has been held that if A owes B a sum of money, and A consents to pay a smaller sum in satisfaction of the debt, that is *nudum pactum*, and B after taking the money can subsequently sue for the balance.¹⁴ It is competent for both parties to an executory contract by mutual agreement without any satisfaction to discharge the obligation of that contract. But, in English law, an executed contract cannot be discharged except by a release under seal or by the performance of the obligations as by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts. The rule is well settled that the obligation on a bill of exchange may be discharged by express waiver.¹⁵ Another important exception that has been engrafted upon the doctrine is that if a stranger pays a part of a debt in discharge of the whole, the debt is gone because it would be a

9 *Shyamnagar Tin Factory (P.) Ltd. v. Snow White Food Products Co. Ltd.*, AIR 1965 Cal 541.

10 *Amar Nath v. B. H. Electricals*, AIR 1972 All 176.

11 *Kapurchand v. Himayatalikhan*, AIR 1963 SC 250.

12 *Pinnel's Case*, 5 Rep 117 a: (1558-1774) All ER Rep 612.

13 9 AC 605, this case does not express the Indian law, *Naoroji v. Kazi Sidick*, 20 B 636, 644.

14 *Manohur v. Thakur Das*, 15 C 319, 326; see *Cumber v. Wane*, 1 Sm. LC; (1558-1774) All ER Rep 436.

15 *Foster v. Dawber*, 6 Ex 839; *Bidder v. Bridges*, 36 Ch D 406, 417.

fraud on the stranger to proceed. So also in the case of a composition made with a body of creditors, the assent to receive the composition discharges the debt because otherwise fraud would be committed against the rest of the creditors.¹⁶

3. **Consideration not necessary.**—The agreements referred to in S. 62 are agreements which more or less affect the rights of both parties under the contract discharged by such agreements; while those referred to in this section are such as affect the rights of only one of the parties. The former case necessarily implies consideration, whereas a remission by a party under this section does not require to be supported by consideration. The legislature in this section has laid down a rule different from that of the English law.¹⁷ The rule is that after the remission has been communicated to the defendant and accepted by him the plaintiff cannot claim the amount remitted.¹⁸ The section not only enables a promisee to release a debt at the instance of a third party but also enables the promisor, whose debt has been released, to take advantage of that relief. S. 41 also carries out the same idea.¹⁹ But it has been pointed out by the Rangoon High Court that a bare agreement to take less than what is due on a monetary claim (without any actual payment being made), or merely to give time for such payment, is void without consideration. S. 63 does not override the necessity for consideration for an enforceable agreement and deals only with actual remission of performance. A subsequent oral agreement to take less than what is due under a registered mortgage bond is an agreement modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible.²⁰ This is the view also expressed by the Madras High Court in one of its decisions.¹ A promise to remit a claim merely out of grace and not out of any legal obligation does not prevent the obligee from enforcing his legal rights.² It is open to a debtor to plead payment and remission of the balance in order to prove satisfaction of a debt. Such a plea of payment and discharge does not involve any plea of a subsequent contract in any way altering the original contract.³ A mutual agreement among creditors to accept a less sum than their full debts in full discharge of those debts is an enforceable contract. The same rule applies when the debt is embodied in a decree and a composition has been arrived at between the judgment-debtor and judgment

16 *Hirachand v. Temple*, (1911)2 KB 330, 341; see post *Kalumal v. Kessumal*, 114 IC 97; as to the def. of a composition deed. see *Chandrashankar v. Magan*, 16 Bom LR 236.

17 *Davis v. Cundasami*, 19 M 398, reld. to in *Jugal Kishore v. Chari & Co.*, 49 A 599; see *Dargahi v. Sant*, 145 IC 801; *Hiranand v. Sher*, 123 IC 225; *Chunna Mal v. Moolchaad*, 55 IA 154; *Mulchand v. Tarachand*, 116 IC 646; *Vedaehalla v. Sivaperumal*, 25 IC 741; *Vasudeva v. Veleppa*, 45 IC 401; but see *Karim v. Debi*, 150 IC 460; the question was not decided in *Sheopratap v. Murlidhar*, 148 IC 501; *Hari v. Trimbak*, 1949 A 440; *Ramaswami v. Gurukhar*, 1939 M 688.

18 *Gopala v. Venkata*, 9 IC 763; *Phoenix Mills v. Dinshaw*, 1946 B 469.

19 *Re Industrial Bank*, 32 Bom LR 1656.

20 *Ma On v. Chettyar Firm*, 8 R 37.

1 *Balasundara v. Ranganatha*, 53 M 127, 135; *Venkata v. Pancha*, 1947 M 414.

2 *Subbaraya v. Kolanavelu*, 26 IC 958; but see post.

3 *Collector Etah v. Kishori*, 53 A 157 FB.

creditor.⁴ In the absence of usage of trade it is not open to any body of tradesmen, whether incorporated or not, to amend or nullify a contract entered into between its individual members or to substitute a new contract for the old one.⁵ It is a question not of law but of fact whether or not there was an agreement varying the terms of an existing agreement. In the absence of satisfactory evidence the existing agreement must prevail.⁶ It was held in *Abaji Sitaram v. Trimbak Municipality*⁷ that "a dispensation or remission under S. 63 requires an agreement or contract". But commenting upon this case the Privy Council has observed: "With this Their Lordships are unable to agree. The language of the section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines". Consideration or agreement, therefore, is not necessary under this section.⁸ Hence a promisor is entitled to take advantage of the remission by the promisee of part performance of the contract to which he is a party, although he is not a party to the agreement which results in the remission.⁹ It has accordingly been held that when an agreement has been made between the parties after the breach of a contract, it may be properly enforced under this section whether such agreement be without consideration or not, it is hardly necessary to invoke the aid of S. 62.¹⁰ Therefore, the view¹¹ that a bare agreement to take less than what is due or to extend the time for payment is void without consideration is no longer tenable. A lessee will be discharged of his liability to pay the full amount of rent under a registered lease if the lessor remits a part of the rent due although the remission is made under a parol agreement.¹² Where the Government decides to recover only 40 p.c. of the total liability under a contract the decision amounts to remitting a part of the debt and, therefore, the Government cannot recover more than 40 p.c. of the liability.¹³ But the fact of dispensation or remission, whether in whole or in part, by the promisee must be of an unequivocal character. Thus where defendants sent a cheque for a smaller amount with a condition that this sum was being paid in full discharge of the total amount due to the plaintiff who cashed the cheque and then intimated to the defendants that he did not agree to receive the amount in full discharge of the sum due, *held*, he was not prevented from suing for the balance.¹⁴ The words of the section are wide enough to cover the case of a conditional release when the promisor will be released on the fulfilment of the condition.¹⁵ Remis-

4 *Venkataswami v. Kotilingam*, 49 MLJ 730; *Kalumal v. Kessumal*, 114 IC 97; as to English law see *Boyd v. Hind*, 26 LJ Ex 164.

5 *Pearce Lal v. Diwan*, 28 ALJ 777, 785.

6 *Nelson & Sons v. Nelson Line*, 1908 AC 108; (1904-07) All ER Rep 244.

7 28 B 66; *Ma On v. Chettyar*, 1935 R 188.

8 *Chunna Mal v. Mool Chand*, 55 IA 154, 160; *Jitendra v. Banerjee*, 1943 C 181; *A. K. Chettyar v. A. K. Firm*, 1939 R 84.

9 *A. Chettyar v. A. Firm*, 1938 Rang 660.

10 *Kalumal v. Kessumal*, 114 IC 97.

11 See *Maung Pu v. Po*, 6 Rang 191; *Ma On v. Chettyar*, 1935 R 188; 1939 R 84.

12 *Karampalli v. Thekku*, 26 M 195.

13 *Hari Chand v. State of Punjab*, AIR 1973 SC 381.

14 *Basdeo v. Dilsukh*, 44 A 718; *Day v. Mc. Lea*, 22 QBD 610.

15 *Abraham v. Lodge "Goodwill"*, 34 M 156.

sion of a part of a claim and acceptance of satisfaction of the balance in a different manner operate as a discharge of liability for breach of a contract. Under the English law the somewhat similar plea of accord and satisfaction by parol has been held to be pleadable.¹⁶ As has been said, accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration, not being the actual performance of the contract itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.¹⁷

4. **Extension of time.**—The section was drafted with the definite object of making an alteration in the law from that which prevailed in England. The section enables a defendant to plead that although the grant of an extension of time is not supported by any consideration, it is nevertheless a binding extension of time and prevents any action being taken within the extended time.¹⁸ The section empowers a promisee to extend the time for the performance of the promise. It cannot be invoked to support an extension of time by the promisee for his benefit but the concession must be advantageous to the promisor.¹⁹ A promise by a mortgagee on the day previous to the sale of the mortgaged property to postpone the sale is not an agreement granting an extension of time for the performance of the mortgagor's promise but is an agreement to refrain from exercising a right; therefore, the section has no application to such a case.²⁰ An oral agreement to forgo interest under a mortgage can be enforced if the mortgagor has actually paid up the principal money at the stipulated time and obtained a discharge in full of the mortgage debt.¹ Where the parties agreed to extend the time for the performance of the contract but no particular period for extension was fixed, the contract must be performed within a reasonable time.² A party may extend the time of delivery beyond the due date by conduct.³ By the mere extension of time for performance of a contract, the contract does not necessarily become a new contract, but the promisee gets certain rights under the section. It is a case of voluntary forbearance and not substitution. But when a new term is introduced in a contract a new contract may be said to have resulted therefrom.⁴ Where time is given for the performance of a contract, limitation does not begin to run

16 *Kalumal v. Kessumal*, 114 IC 97.

17 *British Russian Gazette v. Associated Newspapers*, (1933) 2 KB 617, 643-4: (1933) All ER Rep 320; *New S. Bank v. Probodh*, 1942 C 87.

18 *Jugal Kishore v. Chari & Co.*, 49 A 599; *N. M. Firm v. Theperumal*, 45 M 180; *Mahadeo v. Mathura*, 29 ALJ 295; as to Eng. law see *Williams v. Stern*, 5 QBD 409; *Orme v. Galloway*, 23 LJ Ex 118; 9 Exch 544: 156 ER 232.

19 *Mutthaya v. Lekku*, 37 M 412; *Gopalan v. Dist. Board, Malabar*, 145 IC 476; *Asmatullah v. Bihari*, 68 IC 912; *Sobha v. Nazir*, 1947 S 141.

20 *Trimbak v. Bhagwandus*, 23 B 384.

1 *Maung Shwe v. Chetty Firm*, 43 IC 913.

2 *Bank of Morvi v. Baerlein*, 48 B 374.

3 *Tarachand v. Dreyfus*, 35 IC 449.

4 *Luchmi v. Hoare Müller*, 17 CWN 1098.

until the expiration of the extended period, at any rate as to items not then barred.⁵

It would not be open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit. The agreement to extend may be proved by oral evidence, or by evidence of conduct. Forbearance on the part of the buyer to make a demand for the delivery of goods on the due date as fixed in the original contract may conceivably be relevant on the question of the intention of the buyer to accept the seller's proposal to extend time. The question of extension of time would naturally be a question of fact in each case to be determined in the light of evidence adduced by the parties.⁶

64. Consequences of rescission of voidable contract.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

1. **The section.**—A voidable contract being, according to the definition given in S. 2(i), enforceable at the option of one of the parties, he may, if he likes, enforce it (see S. 19), or rescind it, *i.e.*, disaffirm the contract and give notice of the fact (S. 66) to the other party who is thereafter absolved from all liability. The section requires a party rescinding a voidable contract to restore such benefit as he may have received from the other party and not to make any compensation as is required by the next section. It is already provided in S. 19-A that on rescinding a (voidable) contract induced by undue influence a party may be put “upon such terms and conditions as to the court may seem just.” For the application of the rule to contracts of service, see S. 39 note. It has been pointed out that when the section speaks of a contract, *prima facie*, it refers to such contracts as are spoken of as voidable in S. 19 or 19-A,⁷ or to such contracts as themselves in terms give an option to avoid to one of the parties; however, the decisions seem to be the other way and contracts becoming voidable under Ss. 39, 53 and 55 may be included under this section.⁸ If the contract is not mutually enforceable, it is a voidable contract, *i.e.*, it may be avoided as soon as the person who has a right to avoid it discovers that the cause of action for so doing has occurred. Non-mutuality means that one party to a bargain shall not be held bound to it when he cannot enforce it against the other.⁹ Sections 64 and 65 do not refer by the words ‘benefit’, and ‘advantage’ to any question of ‘profit’, nor does it matter what

5 *Shrinivash v. Raghunath*, 4 Bom LR 50.

6 *Keshavlal v. Lalbhai*, AIR 1958 SC 512, 515.

7 *Brohmo Dutt v. Dharmodas*, 26 C 381.

8 *Natesa v. Appavu*, 38 M 178, 185; *Subba v. Devu*, 18 M 126; *Ballabhdas v. Paikaji*, 38 IC 915; *Mohammad v. Altaf*, 69 IC 789.

9 *Wylson v. Dunn*, 34 Ch D 569.

the party receiving the money may have done with it.¹⁰ The case in which a plaintiff may sue to rescind an unlawful contract seems to be limited by S. 35(b) of the Specific Relief Act. Where the parties are in *pari delicto* the section has no application.¹¹ But a contrary view has been taken in *G. G. Chettiar v. N. G. Gowder*,¹² where it has been held that where vendor and vendee both are at fault and each commits breach of contract, neither party being entitled to claim damages from the other, the vendee is entitled to return of his money. The consequence of rescinding a contract voidable at the option of the person who does so is the release of the opposite party from his obligations under the contract.¹³ Under a contract of hire-purchase of a car, a cheque was paid in part payment of the price, shortly after the hirer intimated that the car was defective, the owner seized the car, he could recover neither under the contract nor on the cheque.¹⁴

2. **Contracts of minors and their guardians.**—It has been pointed out that the terms “person” and “party” are interchangeable terms. The term ‘person’ in this section means such a person as is competent to contract, *i.e.*, one who is of the age of majority according to the law to which he is subject. An infant’s contract is void. Such a contract, therefore, is not any such voidable contract as is dealt with in this section. Neither S. 64 and S. 65 applies to contracts of minors.¹⁵ But Ss. 38 and 51 of the Specific Relief Act give a discretion to the court to order a refund of money or award any compensation which justice may require in a case where an infant rescinds a contract under which he has received a benefit.¹⁶

But where a guardian duly appointed under the Guardians and Wards Act, 8 of 1890, without obtaining the sanction of the court, executes a mortgage of property belonging to a minor in order to discharge debts due to the estate, the mortgage is not void but voidable only. The minor if he desires to set aside the contract is entitled to do so, but only on condition that he shall restore any benefit which he has received thereunder to the person from whom it was received,¹⁷ but the rule does not apply if the minor be not mentioned in the document and be a person whose rights the guardian “was doing everything in his power to injure”.¹⁸ A sale of a minor’s property by the step-mother is not voidable but void, therefore Ss. 64 and 65 do not apply.¹⁹ A voidable

10 *Murali v. I. Film Co.*, 1943 PC 34.

11 *Tamarasherri v. Maranat*, 3 M 215.

12 AIR 1972 Mad 36.

13 *Abdul v. Municipal Committee, Peshawar*, 157 IC 879.

14 *C. C. Bank v. Mohammad*, 1933 L 470.

15 *Dattaram v. Vinayak*, 28 B 181, 190; *Chinnaswami v. Krishnaswami*, 35 MLJ 652; *Ajudhia v. Chandan*, 1937 All 860 FB.

16 *Brohmo Dutt v. Dharmodas*, 26 C 381, 289, on app. *Mohori Bibee v. Dharamodas*, 30 IA 114, fold in *Kamta Prasad v. Sheo Gopal*, 26 A 342 and in *Kanhai Lal v. Babu Ram*, 8 ALJ 1058; *Motilal v. Maneklal*, 45 B 225. See n. 4.

17 *Sinaya v. Munisami*, 22 M 289, refing to *Shurrut v. Rajkissen*, 15 BLR 350; *Girraj v. Kazi Hamid*, 9 A 340; *Raj Lakhi v. Debendra*, 24 C 688, fold in *Tejpal v. Ganga*, 25 A 59; *Jai v. Bechoo*, 1938 All 614.

18 *Veerayya v. Venkata*, 1937 M 66, 81.

19 *Limbaji v. Rahi*, 49 B 576, 580.

transaction may be repudiated by an act or omission of a minor during minority by which he intended to communicate the repudiation, or by suit.²⁰ See S. 11 note.

3. Restoration of Benefit.—A party who has received a benefit under a voidable or void contract is bound to restore it or make it good.¹ The section, of course, cannot mean that a person rescinding a contract must restore all that he has received under it irrespective of what he has given under it. He should be made to restore any balance of advantages received under the contract which can be clearly separated off from the advantage for which consideration has been given by him.² When a transfer is set aside under S. 53, T. P. Act, the transferor is bound to restore to the transferee the price he has received.³ Contracts very often contain stipulations of forfeiture of a certain sum of money. Such a clause is good and enforceable. The section has no application to such a case.⁴ Ordinarily the benefit which a party receives when he sells property is the price or the consideration money which the vendee pays. Thus, where a guardian sells his ward's property for purposes not binding on the ward and invests the sale proceeds in the purchase of other lands, the lands so purchased do not constitute "the benefit" within the meaning of the section.⁵ The obligation under the section to restore the advantage received under an agreement is not confined to the parties to the agreement but extends to any person who may have received that advantage.⁶ But this statement of the rule is not of indefinite application, because it has been laid down by the Privy Council⁷ that it cannot be postulated that every person who has received an advantage from some transaction is under an obligation to reimburse another who has been put to loss or expense in this connection. The decision in *Ammani Ammal v. Ramaswami*⁸ indicates the limitations to which a claim for reimbursement in similar circumstances must be held to be subject. It is not enough that the work should result in benefit to the defendant, but he must have been in a position after the execution of the work to exercise the option whether to avail himself of the benefit.⁹

The section has nothing to do with a charge. Where pursuant to a contract for the purchase of certain property a plaintiff pays off certain encumbrances on it, then the agreement falls through, he is not entitled to a charge on this property, he can only claim a refund of the amount paid towards encumbrances. The plaintiff would be entitled to a charge, if at all, on considerations of equity either by the principle of subrogation or on such similar principle.¹⁰

20 *Jagadamba v. Anadi*, 1938 P. 337.

1 *Chitturi v. Boddu*, 28 IC 57; *Atlee v. Backhouse*, 7 LJ Ex 234: 150 ER 1298.

2 *Mohammad v. Altaf*, 69 IC 789.

3 *Parashram v. Sadasheo*, 1936 N 268.

4 *Natesa v. Appavu*, 38 M 178, 188, 190.

5 *Chinnaswami v. Krishnaswami*, 35 MLJ 652; *Zinda v. Roshnai*, AIR 1928 Lah 250; *Ramdin v. Mansaram*, 51 A 1027; see *Bechu v. Bhabhuti*, 52 A 831.

6 *P. & M.; Girraj v. Hamid*, 9 A 340 reld to.

7 *Ram Tuhul v. Biseswar*, 2 IA 131.

8 37 MLJ 113.

9 *Lakshmanan v. Arunachalam*, 1932 M 151.

10 *Ponnammal v. Pichaithevan*, 52 MLJ 33, see authorities reld to.

When a sale or mortgage, which a minor seeks to avoid on coming of age, was made by someone who was *prima facie* entitled to bind a minor, he is bound to refund the purchase money when his estate has benefited by it or to hold the property charged with the amount.¹¹ Where the mother as the natural guardian of a minor sells the land belonging to the minor and with the money received from the vendee purchases another land for the minor, and the minor on attaining majority files a suit against the vendee and his mother for the possession of the land sold the vendee can claim only the money paid as consideration but not the land purchased with at that consideration for the minor.¹² A deposit is a guarantee for the performance of a contract. Where the contract goes off by the default of the purchaser, the vendor is entitled to retain the deposit, provided there be such acts on the part of the purchaser as would make his conduct amount to a repudiation on his part of the contract.¹³ The implied terms of a deposit are "that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee",¹⁴ i.e., it serves two purposes; if the purchase is carried out it goes against the purchase money, but its primary purpose is that it is a guarantee that the purchaser means business.¹⁵ Sec. 64 cannot be invoked when earnest money is forfeited.¹⁶ But where part of the price has been paid otherwise than as a deposit, and there is no question of damages, the buyer may be entitled to recover the part of the price paid.¹⁷ Where an agreement for the purchase of a house gives the plaintiff an option of withdrawing, if not satisfied, the plaintiff is entitled to recover his earnest money but not damages when he avails himself of the option.¹⁸

4. When rescission possible.—As a general rule, a party claiming the right to rescind a transaction, and thereby to undo it, will be allowed to do so where the court can put the parties in the same situation as they were in before.¹⁹ Relief by way of *restitution in integrum* can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. Delay and change of circumstances may prevent a party from claiming this relief.²⁰ Where a party disputing the quality of goods supplied uses a portion larger than usual for testing it, then sells a part, he adopts the contract; he cannot

11 *Limbaji v. Rahi*, 49 B 576.

12 *Devinder Singh v. Shiv Kaur*, AIR 1970 Punj 549.

13 *Doulattram v. Alibhai*, 33 IC 668 on app 50 IC 41; *Kumaraswami v. Arunachalam*, 52 MLJ 84; *Nadiar v. Satis*, 55 C 638; *Mohammad v. Mohammad*, 17 ALJ 309 (earnest money); *Tikam v. Kakhan*, 1937 L 842.

14 *Howe v. Smith*, 27 Ch D 89: (1881-85) All ER Rep 201, cited in *Mangobinda v. Boisogomaff*, 67 IC 714.

15 *Soper v. Arnold*, 14 AC 429.

16 *H. C. Mills v. Tata Air Craft*, AIR 1970 SC 1968.

17 *Bua v. Rattan*, 28 IC 12.

18 *Chynoweth's Case*, 15 Ch D 18, 20; *Freeman v. Jeffries*, LR 4 Ex 189; *Bwlch-y-Plwm Lead Mining Co. v. Baynes*, LR 2 Ex 324.

20 *Western Bank v. Addie*, LRI Sc. App. 145, 164: 17 Digest (Repl) 81.

rescind it and recover the price.¹ A contract cannot be rescinded on the grounds of breach of warranty except where there was an original agreement that the party should be at liberty to rescind in such a case. One party alone cannot, by his own act, rescind the contract.² A party can claim rescission of an executed contract on account of fraud but not on account of innocent misrepresentation, unless there be such a complete difference between what was supposed to be and what was taken as to constitute a failure of consideration.³ Where property sold was not substantially different from that agreed to be sold, rescission cannot be allowed, even if the sale be subject to annulment for error.⁴ A person cannot rescind a part of a contract, it must be rescinded in toto if at all. A party cannot claim a rescission of a contract unless he can return the article in the same state in which it was at the time of making the contract.⁵ A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*, for a contract cannot be rescinded in part and stands good for the residue. If it cannot be rescinded in toto it cannot be rescinded at all; but the party complaining of the non-performance or the fraud must resort to an action for damages.⁶ A party on rescinding a contract is bound to restore the advantage he has received, for he cannot resume the property he has parted with and at the same time keep the money or other advantage which he has received.⁷ The word rescind implies an express unequivocal cancellation of the contract.⁸

Where money was lent to a person who, the lender knew, was an infant, the Privy Council set aside the mortgage without requiring the infant to restore the benefit received.⁹ Where property belonging to a minor is alienated by a person who is disqualified from acting on behalf of the minor, *e.g.*, the mother of a Muhammadan infant, the minor can ignore it as a nullity and no liability to refund the consideration can be imposed upon him as a condition to his recovery of the property.¹⁰ In case of a sale of joint family property if it be proved that the consideration money was carried to the assets of the joint estate and that the minor obtained the benefit of his share, he cannot recover his share of the property without refunding his share of the purchase money.¹¹ Money lent under a mistake of fact may be recovered.¹²

There are three classes of cases where the question of repudiation has to be considered: (1) Where there is an executory contract, the defendant will be

1 *Harnor v. Groves*, 24 LJCP 53.

2 *Gompertz v. Denton*, 1 Cr. & M. 207.

3 *Seddon v. N. E. Salt Co.*, (1905) 1 Ch 326; (1904-07) All ER Rep 817.

4 *Re Belcham's Contract*, 1930 Ch 56.

5 *Clarke v. Dickson*, 27 LJQB 223. See S. 19 n. 9.

6 *Sheffield Nickel Co. v. Unwin*, 2 QBD 214, 223.

7 *Clough v. L. & N. W. Ry.*, LR 7 Ex 26, 37; (1861-73) All ER Rep 646; fold. in *Undakath v. Chalora*, 1932 M 303.

8 *Pappu v. Pichu*, 1938 M 493; *Etbary v. Bellamy*, 1938 R 209.

9 *Mohori Bibee v. Dharmodas*, 30 IA 114.

10 *Gulam v. Ramdhan*, 103 IC 209.

11 *Modhoo v. Golbur*, 9 WR 511 FB fold in *Bapanna v. Paruchuri*, 91 IC 758.

12 *Freeman v. Jeffries*, LR 4 Ex 189; 38 LJ Ex 116.

exonerated if he can make out that he has not affirmed the contract, but that when he had notice of fraud, *etc.*, he disclaimed or repudiated it; (2) where the contract has been executed, where chattel or chose in action or land has been transferred, or conveyed, there the defendant must prove that there has been a *restitutio in integrum* as far as possible; and (3) the case of shares, in which case defendant must prove that he has taken steps within a reasonable time after the discovery of the fraud to have his name removed from the register.¹³

65. Obligation of person who has received advantage under void agreement or contract that becomes void—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the 1st of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first day of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

1. The section.—The section embodies a well-known rule of equity.¹⁴ The section provides for restitution of or compensation for any advantage received under an agreement in two cases, (1) where an agreement is discovered to be void, and (2) where a contract becomes void. A contract being or becoming void is something different from a contract abandoned. Thus, where a contractor leaves the work unfinished, thereupon the other party completes it, the contractor cannot recover for the work done on *quantum meruit* basis, in the absence of evidence of a fresh contract to pay for the same.¹⁵ The principle of *quantum meruit* applies where for some technical reason an agreement is invalid.¹⁶ The implied obligation to pay is an obligation imposed by

¹³ *First National Reinsurance v. Greenfield*, (1921)2 KB 260, 266.

¹⁴ *Punjab Govt. v. Baijnath*, 1945 L 164.

¹⁵ *Sumpter v. Hedges*, (1893)1 QB 673; See *Cutter v. Powell*, 6 TR 320: (1775-1802) All ER Rep 159; *Madura Municipality v. Naidu*, 1939 M 957; *Sunderlal v. Laaman*, 1949 N 292.

¹⁶ *Ayyar v. Dist. Board*, 1941 M 887; Halsbury, 4th ed, Vol 9 Para 692.

law, not by inference of fact, arising from the performance and acceptance of services. So a party is entitled to rely on a *quantum meruit*, although the agreement is unenforceable.¹⁷ Where there is an express contract nothing can be claimed on the basis of *quantum meruit*.¹⁸ Neither this section nor S. 64 applies to a case in which there is a stipulation that by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract. Thus where a contract of insurance is declared to be void, because the insured made a false statement as to his age, the insurance company is not bound to restore the premium paid by the insured during his lifetime.¹⁹ In a suit under this section a party seeks to be placed in the position in which he would have been if no agreement had been entered into.²⁰ The section applies to cases that fall within the ambit of S. 56, but the principle of it should apply to all cases of frustration.¹ A plaintiff cannot be said to have received an advantage when he has applied the sum received from the defendant, or has made himself liable, to meet losses arising from the carrying out of the defendant's instructions.² The section applies to payments made under valid agreements and not under void ones. The advantage sought to be recovered must have been received before the contract becomes void or the agreement is discovered to be void. The line is drawn at the time the agreement is discovered to be void or when the contract becomes void.³ The relief contemplated by the section as also by Art 96 of the Limitation Act is that the party prejudiced by the mistake should be relieved from the consequences thereof. But where the loss arises not by reason of the mistake, but by reason of laches even after the discovery of the mistake, no compensation can be recovered.⁴ Provisions of the section do not apply to a contract the right to enforce specific performance of which has become barred.⁵ Where a lease is void, the lessor having no right to make the grant, the lessee is entitled to the return of the money paid to the lessor.⁶ Where by an agreement the trustees of a temple in consideration of an advance of money granted to the plaintiff a lease of the right to manage the temple lands, *held*, the plaintiff would be entitled to recover the advance from the trustees.⁷ The section applies when a contract is entered into by a person competent to contract but incompetent to transfer the property he purports to transfer.⁸ It has also been said that the section has no application to a case

17 *Craven-Ellis v. Canons*, (1936)2 KB 403; (1936)2 All ER 1066.

18 *Cutter v. Powell*, 2 Sm LC 1: (1775-1802) All ER Rep 159.

19 *Oriental Life Assurance Co. v. Narasinha*, 25 M 183.

20 *Madura Municipality v. Naidu*, 1939 M 957.

1 *Parshotam v. M. C. Bata*, 1949 EP 301.

2 *Harjivanlal v. Radhakison*, 172 IC 330 PC.

3 *Wolf & Sons v. Dadyba*, 44 B 631.

4 *Madras Sugar Factories v. Shaw*, 14 MLJ 443; see *Mohan v. Manzoor*, 1943 PC 29 for principle underlying the section.

5 *Pulin v. Geddam*, 1945 M 171.

6 *Rajendra v. Lalmohan*, 164 IC 277.

7 *Krishnan v. Sankara*, 9 M 441, 444.

8 *Rajeshwar v. Ajab*, 118 IC 865.

where there could have been no contract.⁹ "The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act and cannot arise in the case of an infant." So the section has no application to a contract by a person disqualified from entering into a contract by law.¹⁰ A party who enjoys the benefit of a contract cannot, when the right to get either rescission or reformation is barred, plead that he is not bound by one of its terms. The cases in which a party to a contract has been held not to be bound by it without setting aside the contract are cases where the contracts are void in toto.¹¹ The section has no application to the case of a loan to a minor,¹² or to a contract purported to be entered into on behalf of a minor,¹³ or to contracts deliberately entered into by parties knowing them to be void,¹⁴ or to a contract which is only voidable at the option of one of the parties, *e.g.*, in case of fraudulent preference. S. 64 applies to voidable contracts but provides for repayment only by the person at whose option the contract is rescinded.¹⁵ The section may in conceivable cases cover agreements which are void *ab initio* but not when they are known to be so or are of a fraudulent nature.¹⁶ A party knowingly entering into a voidable contract cannot avail himself of the remedy under this section.¹⁷ Where an insurance policy is vitiated by the suppression of material facts, the policyholder has no right to claim for a refund of the money paid as premium after the contract has been rescinded. An action for money had and received does not lie, and secs. 64 and 65 of the Contract Act has no application.¹⁸ The question of compensation can only arise when the advantage received can be restored. Interest on money under a void contract would only be payable after the advantage has been refused to be restored.¹⁹ The words compensation for an advantage seem to be a contradiction in terms. This must mean valuing or qualifying the advantage retained. War rendering performance of a contract impossible, each party becomes bound to restore to the other the advantage he has received under it.²⁰ This section is not confined in its operation to agreements but applies to transfer as well. Where relief is not claimed under the section in the court below, it cannot be obtained in the appellate court but a separate suit it maintainable.¹

9 *Chandra v. Artra*, 1936 N 15.

10 *Lal v. Lal*, 161 IC 351.

11 *Sasi v. Genda*, 82 IC 970; see *Banku v. Kristo*, 30 C 433; *Sanni v. Siddick*, 49 IC 76.

12 *Gulab v. Chunnilal*, 122 IC 266. See S. 11 n. 8.

13 *Kali v. Purna*, 1948 C 269.

14 *Gopala v. Annadana*, 1940 M 719.

15 *Sivagami v. Subramania*, 168 IC 941.

16 *Rudra v. Gan*, 1938 B 54.

17 *Gendsing v. Gowardhan*, 1938 N 451.

18 *Mithoolal v. L. I. C.*, AIR 1962 SC 814, 821; *L. I. C. v. Canara Bank*, AIR 1974 Mys. 51, 59.

19 *District Board v. Balwant*, 1939 L 564; but see *Madura Municipality v. Naidu*, 1939 M 957.

20 *Govind v. Radbone*, 1948 PC 56.

1 *Raja Mohan v. Ahmed*, 169 IC 785.

2. **Becomes void.**—The section lays down a proposition much wider than anything to be found in English law.² In England, if a contract provides an express condition under which money can be recovered from the defendant, the plaintiff will be prohibited by the rules of interpretation from imposing an additional condition which the parties had not chosen to provide in the contract. Here, however, the law is different. Thus, where the interest of a judgment-debtor was sold in execution of a decree, but before confirmation of the sale, he sold the property privately to the plaintiff in the event of the sale not being confirmed, with a condition that if the purchaser failed to get possession of the property he would be entitled to recover the amount paid by him with interest, on confirmation of the execution sale, a contingency not provided for, the purchaser under the private sale was held entitled to recover the amount.³ The words 'when a contract becomes void' cover the case of a voidable contract which has been avoided. When the plaintiff elects to rescind a voidable contract, the defendant is bound to hold any advantage he has gained from the contract for the benefit of the plaintiff. "A party exercising his option to rescind is entitled to be restored as far as possible to his former position"⁴ According to the dictum of the Privy Council in the above case, the section is not limited to those cases only in which the contract became void at a later stage by the occurrence of an unexpected event, but includes in its purview cases in which a contract is voidable at the instance of a particular person and has in fact been avoided. "The notion which has so long prevailed (about the universal applicability of the rule of *caveat emptor*) will now pass away, and no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed." In England the doctrine of *caveat emptor* is not applied with the same strictness as was the case formerly.⁵ Where a contract with a publisher was not void at the outset, but its performance became subsequently impossible owing to the forfeiture of the copies published, which could not have been foreseen, the section was held not to have any application, so the loss lay where it had fallen; therefore, the money advanced could not be recovered.⁶ A purchaser of land in an Indian State failing to obtain possession except on a condition, which he refuses to comply with, is entitled to the refund of the purchase money with interest.⁷ Where under a contract of the year 1945 a company agreed to pay royalty to the Ruler of the Native State of Kotah for monopoly rights granted to it for quarrying stone in a specified area and also for exemption from payment of income-tax, no specific amount being payable for such exemption, and thereafter the Finance Act was extended to Kotah on its formation as a Part B State under the Constitution, the clause exempting the company from income-tax

2 See *Morley v. Attenborough*, 18 LJ Ex 148: (1843-60) All ER Rep 1045.

3 *Mahabir v. Ganga*, 42 A 7.

4 *Satgur v. Har Narain*, 62 MLJ 451 PC: Kerr on *Fraud* cited; *Lachmi v. Lachmi*, 107 IC 36.

5 *Labh v. Jamnun*, 15 Lah 751, the English law differs from the Indian law.

6 *Devi v. Bainsi*, 51 IC 412.

7 *Gajadhar v. Dayaram*, 152 IC 644; *Leeman v. Lloyd*, 14 LJQB 165 (shares); *Johnson v. Goslett*, 27 LJCP 122.

became illegal by reason of the Finance Act, and as this clause was not severable the entire contract became void with the result that each party became liable to compensate the other party to the extent of the benefit received from the latter.⁸ Where the plaintiff had taken a lease of a shop from the defendants and had paid the lease money in advance, but the shop caught fire and was burnt, the contract became void, so the plaintiff was entitled to a refund of the portion of the lease money representing the unexpired period of the lease.⁹ A contract becomes void when it ceases to be enforceable by reason of some substantive law.¹⁰ In a Kerala case a direction for the refund of the earnest money was made under the following circumstances. An agreement was entered into by the defendant on his own behalf as well as on behalf of his minor sisters as their guardian though the father was alive. Rs. 1,500 was paid by the plaintiffs by way of earnest money. Under the Hindu Minority and Guardianship Act, 1956, the shares of the minor sisters were not alienable without the permission of the court, and the defendant not being the natural guardian of the minors was not entitled to get such permission. Hence it was not possible for the defendant to perform the contract to sell. Held that the plaintiffs were entitled to get back the earnest money from the defendant.¹¹ The correctness of this decision is open to doubt. Where the Ruler of an Indian State before merger granted to a transport company a licence for monopoly service within the State, which became void after merger on the introduction of the Motor Vehicles Act, the successor Government is bound to restore the benefit received by the Ruler for granting the monopoly right.¹²

3. **Discovered to be void.**—A conflict of decisions had arisen over the interpretation of the expression “discovered to be void.” The question that was raised was whether it included cases of agreements which were void *ab initio*. On the one hand, it was pointed out that the section contemplated a case of an agreement being void *ab initio*, because it was difficult to imagine how an agreement could be discovered to be void unless it was void from the beginning.¹³ On the contrary, it was held in other cases that the section “does not apply where the object of the agreement was illegal to the knowledge of both parties at the time it was made”,¹⁴ because in such a case, there never

8 *State v. A. S. I. Kata*, AIR 1971 Raj 128.

9 *Shrawan v. Sheoratan*, 158 IC 358.

10 *Viewanath v. Deoka*, 1948 N 382.

11 *Avisa v. Pravakaran*, AIR 1971 Ker 239, 242-43.

12 *State v. Bundi Electric Supply Co.*, AIR 1970 Raj 36, 47.

13 *Gulabchand v. Fulbai*, 33 B 411, 416; *Khushal v. Labhan*, 110 IC 351; *Sukhdeo v. Kashi*, 90 IC 340; *Hira v. Jowala*, 27 IC 1008; *Arunachala v. S. Municipal Council*, 58 M 65; *Jone Bin v. Manuel*, 14 R 597; *Sadhu v. Jhaman*, 1937 211.

14 *Nathu Khan v. Sewak Koeri*, 15 CWN 408; *Dayabhai v. Lakhmichand*, 9 B 358; *Sibkisore v. Manik*, 21 CLJ 618; *Prabu Mal v. Babu Ram*, 89 IC 684; *Ram Partap v. Ram*, 18 IC 9; *Badhu v. Sheochand*, 67 IC 367; *Changa Mal v. Sheo Prasad*, 42 A 449; *Mir Mahomed v. Khubomal*, 21 IC 517; *Bhure v. Sheogopal*, 54 IC 794; *Dipan v. Ram*, 32 A 388; *Bhojraj v. Dukala*, 57 IC 680; *Maung Kyi v. Kyew*, 93 IC 119 (void in part); *Hemnandan v. Chellaram*, 15 IC 836; *Dhanna v. Kosila*, 1941 P 510; *Bhiku v. Dattaraya*, 1947 B 392; *Lakkiram v. Brailal*, AIR 1974 Or. 44, 51.

having been any contract, the agreement could not be said to have been discovered to be void, it was known to be void when the contract was made.¹⁵

The conflict may now be regarded as set at rest by the ruling of the Privy Council in *Harnath Kuar v. Indar Bahadur*,¹⁶ which lays down that an agreement discovered to be void is one discovered to be not enforceable by law and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.¹⁷ Where a deed of sale fails for want of title in the vendor, the vendee is entitled to recover under sec. 65.¹⁸ The presumption is that the parties know the law and thus are aware of the illegality of the contract at the time it is entered into; any allegation as to the subsequent discovery of the illegality must be strictly proved.¹⁹ Where agreements were subsequently discovered to be void the defendants would be liable to repay under this section.²⁰ Thus, a lease in excess of the period allowed by law is void for the period in excess; the lessor will be entitled to get back possession on the lease becoming void on making compensation to the lessee. The agreement of course is not illegal in such a case.¹ A contract which is not in accordance with statutory requirements is no contract at all, therefore cannot be said to have been discovered to be void under the section.² Sec. 65 makes a distinction between an agreement and a contract. The earlier part speaking of an agreement being discovered to be void means that the agreement is not enforceable. It means that it was void. The second part of the section refers to a contract becoming void. In both the cases any person who has received any advantage is bound to restore such advantage. But where at the time when the agreement is entered into both the parties knew that it was not lawful there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, sec. 65 does not apply. Thus where a mining lease in favour of a person is to his knowledge contrary to Mines and Minerals Act, he is not entitled to claim

15 *Mohori Bibee v. Dharmodas*, 30 IA 114; *Motilal v. Maneklal*, 45 B 225 PC (case of minors); *Punjabhai v. Bhagwandas*, 53 B 309; *Jugal v. Chedda*, 1 ALJ 43; *Monosseh v. Shapurji*, 10 Bom LR 1004; *Ramdin v. Muhammad*, 3 ALJ 686; *Rudragowda v. Ganagowda*, 39 Bom LR 1124; *Nathubai v. Wailaji*, 169 IC 675; but see *Gokuldas v. Gulabrao*, 89 IC 143.

16 50 IA (75), see the lengthy discussion in *Jone Bin v. Manuel*, 14 R 597.

17 *Annada v. Gour*, 50 IA 289; cf. *Bai Dewali v. Umedbhai*, 40 B 614; *Gopilal v. Pandurang*, 92 IC 640; *Javerbhai v. Gordhan*, 39 B 358, distgd in *Parshottam v. Chhatrasangji*, 41 B 546; *Bhola v. Kuar*, 162 IC 362; *Appaswami v. Narayana*, 54 M 112; *Sadia v. Ambhiria*, 116 IC 497; *Labh v. Jammu*, 151 IC 1 FB fold. in *Bakshi v. Bachan*, 155 IC 722; *Jone Bin v. Manuel*, 164 IC 522; *District Council v. Anna*, 1941 N 273; *Ghulam v. Nurali*, 1935 L 401; *Dilip v. Jagat*, 1938 L 72.

18 *Harnath v. Indar*, 50 IA 75.

19 *Shambhoo v. Dhaneshar*, 101 IC 265; *Annada v. Gour*, 50 IA 239.

20 *Ganga v. Ram*, 43 IC 266; *Ram Nath v. Damodar*, 80 IC 855.

1 *Amar v. Himmatt*, 157 IC 737.

2 *Anandrao v. Tukaram*, 46 IC 326; *Battersby v. De Cruz*, 63 C 31, 40; see *Municipal Corp. of Bombay v. Secretary of State*, 58 B 650; but see *Madura Municipality v. Raman*, 161 IC 46.

refund of the sum paid under the lease.³ A corporation receiving any advantage under an agreement discovered to be void is bound to restore it.⁴ The court is not bound "to award compensation in all cases as a matter of course where the document is found to be void in consequence of the Bhagadari Act".⁵ The case is also different where property is bought subject to encumbrances. Here the purchaser takes the property subject to encumbrances; if they turn to be invalid, the vendor has nothing to complain of, the purchaser is entitled to the benefit.⁶

4. **Illustrations.**—By way of illustration certain decisions are cited below, but in each case where the section has been held not to apply one should be careful to note whether the Privy Council decision referred to above has been considered or not. On a landlord setting aside a mortgage of an occupancy holding, the mortgagee is not entitled to sue for the recovery of the mortgage money.⁷ When a vendor's title to land is bad he is liable to return the purchase money to the vendee.⁸ An auction purchaser who has paid the full price can bring a suit to recover the money on being dispossessed of the property by a successful claimant. Such a suit is one for the recovery of money had and received on a total failure of consideration and is based on the notion of a fictitious promise to pay,⁹ so it does not, strictly speaking, come under this section. Where both parties contracted on the basis that certain stones were emeralds, the fundamental error common to both parties as to a matter of fact essential to the agreement rendered it void (S. 20) and the buyer was entitled to have his money back.¹⁰ In the absence of an express agreement in a mortgage deed a personal covenant to pay cannot be implied, even if the deed turn out to be ineffective. If the deed be not registered the section has no application.¹¹ The section has been held not to apply to the case of the transfer of an proprietary interest in the *sir* land.¹² This section does not apply to the case of transfer of land by an agriculturist to a non-agriculturist, as the alienation does not become void under the Punjab Alienation of Land Act.¹³ On a contract of charterparty becoming impossible of performance by reason of the vessel being stranded on the way to load the cargo, the voyage not being performed, the freight paid in advance is recoverable.¹⁴ Purchase price is

3 *Kuju Collieries v. Jharkhand Mines*, AIR 1974 SC 1892.

4 *Arunachala v. Srivilli*, 1934 M 480.

5 *Haribhai v. Nathubhai*, 38 B 249, cited in *Zaverchand v. Jesang*, 33 Bom LR 499.

6 *Izzatunnissa v. Pratap*, 31 A 583.

7 *Labh v. Jamnun*, 134 IC 1116 but see *Badlu v. Seochand*, 67 IC 367.

8 *Zainub v. Abizun*, 1934 P 280; *Saraswatibai v. Ganesh*, 1950 Nag 229.

9 *Asadullah v. Karam*, 4 Lah 354, fold in *Mehr Chand v. Milkhi*, 13 Lah 618; Halsbury, 4th ed., Vol 9, Para 667-671.

10 *Fateh v. Lachhmi*, 57 IC 481; *Rani Kunwar v. Mahbub*, 28 ALJ 327.

11 *Bhoraj v. Dukala*, 57 IC 680; per contra *Ganga v. Ram*, 43 IC 266; *Fakira v. Nabhu*, 29 IC 751.

12 *Depan v. Ram*, 7 ALJ 330; see *Tamarasherri v. Maranat*, 3 M 215.

13 *Jalal v. Hukum*, 1939 L 30.

14 *Sivanadian v. Batchu*, 48 MLJ 413. But "advance freight" is payment made for undertaking to carry and is not recoverable, *Smith v. Pyman*, (1891)1 QB 42.

recoverable when the purchase falls through owing to the claims of the vendor's creditors.¹⁵ Where the plaintiff had taken a shop but the building was burnt down by fire, he was held entitled to a refund of the portion of the lease money representing the unexpired period.¹⁶ The section does not apply to the case of money spent in payment of business debts of minors.¹⁷

5. **Illegal contracts.**—A distinction has been drawn between cases where an illegal purpose has been carried out and where it has not been carried out. No man can set up his own fraud as a defence any more than as a cause of action.¹⁸ An exception is engrafted on this rule by allowing a *locus penitentiae* to one or both of the parties in consideration of the fact that the illegal purpose of the contract has not been fulfilled. But when the illegal purpose has been partly fulfilled, no relief is given.¹⁹ When an agreement is illegal, money due under it cannot be recovered by a change in the form of action based on another agreement which is connected with it.²⁰ Under S. 84 of the Indian Trust Act, in case of transfer of property, so long as an unlawful or void agreement remains unperformed any money paid under it may be recovered back as received to the use of the person who has so paid it.¹ This section, it has been held, does not apply to an agreement for illegal consideration, but the money is recoverable under the general principles of English law, namely, that a person whose hands have not been tainted by corruption, and who has not committed any act which fixes him with having been a party to a fraud, is entitled to get back the money or property which he left with another.² Sums paid under marriage brocade contracts may be recovered if the marriage has not taken place.³ "It is manifest justice that the defendants should not be allowed to retain the money".⁴ Marriage brocade contracts are of two kinds, only in one of the two cases can the benefit received be recovered.⁵ Money deposited as security for the performance of a wagering contract may be recovered, if not paid over.⁶

15 *Parashram v. Sadasheo*, 167 IC 703.

16 *Shrawan v. Sheoratan*, 158 IC 358.

17 *Venkata v. Balaya*, 1936 M 595.

18 *Doe d Roberts v. Roberts*, 2 B & Ald. 367.

19 *Venkata v. Pullayya*, 59 M 998, 1012 FB, see cases reld. to. See below.

20 *Kali v. Mono*, 1935 C 748.

1 *Ganga Ram v. Baldewa*, 194 PR 1882, reld. to in *Prabu Mal v. Babu Ram*, 89 IC 684; *Hirjee v. Nyun*, 84 IC 295; *Taylor v. Bowers*, 1 QBD 291: (1874-80) All ER Rep 405.

2 *Srinivasa v. Sesha Ayyar*, 41 M 197 (marriage brocade contract); *Srikakolapur v. Gudivada*, 34 MLJ 561, 44 IC 319 (wagering contract); *Durgesh v. Bhowanipur Banking Corp.*, 48 CWN 260.

3 *Dholidas v. Fulchand*, 22 B 658.

4 *Ram Chand v. Audaita*, 10 C 1054, *Juggeshur v. Panch Kowree*, 14 WR 154 fold; *Gulabchand v. Fulbai*, 33 B 411; *Srinivasa v. Sesha Ayyar*, 41 M 197, 41 IC 783; *Sadhu v. Jhaman*, 171 IC 1005.

5 *Sonphula v. Gansuri*, 169 IC 901.

6 *Srikakolapur v. Gudivada*, 34 MLJ 561, but see *Changa Mal v. Sheo Prasad*, 42 A 449; *Dayabhai v. Lakhmichand*, 9 B 358, 362; *Nagappa v. Arunchalam*, 47 MLJ 876 (court divided). See S. 23 note.

When a purchase is opposed to the provisions of the Punjab Alienation of Land Act, the purchaser may recover the price paid by him to the vendor.⁷

Similarly, persons have been allowed to recover property which they have assigned away where they intended to defraud creditors who, in fact, were never injured. But where the fraudulent or illegal purpose has actually been affected by means of the colourable grant, the maxim in *pari delicto potior est conditio possidentis* applies. The court will assist no man to obtain advantage of his own fraud.⁸ The rule that a person in *pari delicto* cannot recover applies not only where the unlawful agreement has been completely carried out but also where it has been substantially carried out.⁹ The mere intention to effect an illegal object does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it.¹⁰ Compensation has been ordered to be made where a godown was burnt down during the pendency of a lease.¹¹

The section deals with agreements enforceable by law and with agreements not so enforceable. The criterion which causes the court to say that it will or will not assist the parties to recover the money paid under an unlawful agreement is not whether they have had a *locus penitentiae* before carrying out the purposes of the fraud, but whether it would be contrary to morality and public policy to give the parties assistance in a court of law, where the purpose of the fraud has actually been wholly or partially successfully carried out. Where the fraud is a wholly imaginary one, so that the illegality cannot, in any sense of the word, be carried out, the parties do not realise the illegality and nobody is defrauded except the parties themselves, the plaintiffs will be entitled to a refund of their advance.¹² Where the plaintiff bought a house *benami* in the name of the defendant, occupied it ostensibly as a tenant, and the defendant obtained an *ex parte* decree for recovery of possession then the plaintiff filed a suit for a declaration of his title, *held*, he was bound by the *ex parte* decree. "It is laid down generally that a man cannot set up an illegal or fraudulent act of his own in order to avoid his own deed".¹³ An order for refund of the consideration money may be made where the alienation is declared to be void and the transfer is set aside.¹⁴ So also in case of a sale

7 *Bahadur v. Mohammad*, 151 IC 172; *Quadir v. Hakim*, 139 IC 17.

8 *Petherpernal v. Muniandi*, 35 IA 98, 102; *Rangammal v. Venkatachari*, 20 M 323; *Kondeti v. Nakama*, 31 M 485; *Honapa v. Narsapa*, 23 B 406; *Goberdhan v. Ritu*, 23 C 962; *Taylor v. Bowers*, 1 QBD 291; (1874-80) All ER Rep 405; *Govinda v. Lala Kishun*, 28 C 370, 379; *Jadu Nath v. Rup Lal*, 33 C 967, see authorities cited; *Girdharilal v. Manikamma*, 38 B 10; *Sweydali v. Esnali*, 23 IC 370; *Kammula v. Yilapani*, 1936 M 717 FB.

9 *Muthuraman v. Krishna*, 29 M 72.

10 *Symes v. Hughes*, LR 9 Eq 475; 39 LJ Ch 304.

11 *Dhuramsey v. Ahmedbhai*, 23 B 15, 21.

12 *Jene Bin v. Manuel*, 14 R 597.

13 *Chenvirappa v. Puttappa*, 11 B 708, for exceptions to this rule, see *Yaramati v. Chundru*, 28 M 326.

14 *Krishnan v. Sankara*, 9 M 441; *Jijibhai v. Nagji*, 11 Bom LR 698; *Haribhai v. Nathubhai*, 38 B 249; *Javerbhai v. Gordhan*, 39 B 358; *Bai Dival v. Umebhai*, 40 B 614.

of an expectancy the consideration money will be recovered when the alienation is set aside.¹⁵

6. **English law.**—The principle of English law referred to above is to the effect that whoever is a party to an unlawful contract, if he has once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the court to fetch it back again. To that general rule there are several exceptions: (1) The case of the oppressor and the oppressed, in which case the oppressed party may recover the money back from the oppressor; (2) Where the illegalities arise from the infringement of a statute intended to protect a particular class of persons, *e.g.*, contracts void for usury under the old statute; (3) If money is paid or goods delivered for an illegal purpose the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out¹⁶; or unless the money or goods be made over.¹⁷ A contract to indemnify a surety for bail against his liability is contrary to public policy and, therefore, illegal and void. The principle applicable to such cases is that where money has actually been paid upon an immoral or illegal consideration, fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid; but the money may be recovered by the person making the payment if the illegal purpose be not effected.¹⁸ Where an advance was made to a company to give it a fictitious credit, when it enjoyed till the commencement of the winding up, it was too late to repudiate the bargain and claim the money.¹⁹ The true test for determining whether or not the parties are *in pari delicto* is by considering whether the plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party.²⁰ Where the parties are *in pari delicto*, *e.g.*, where a father pays money or gives security to a banker to shield his son from prosecution for having delivered to the bank instruments with his father's name endorsed upon them, and the endorsements were forgeries, the agreement giving security was void, so the security was ordered to be delivered up.¹ In the case of an agreement to stifle a prosecution, a party, in order to obtain relief, must prove pressure or undue influence.²

15 *Harnath v. Indar*, 50 IA 69.

16 *Kearley v. Thomson*, 24 QBD 742: (1886-90) All ER Rep 1055; *Collins v. Blantern*, 1 Sm LC 369, Ed 7: (1558-1774) All ER Rep 33; *Petherpermal v. Muniandi*, 35 1 A 98, 103; *Durgesh v. Bhawanipur Banking Corpn.*, 43 CWN 260. As to exceptions to the rule see *Parkinson v. College of Ambulance*, (1925) 2 KB 1 6: (1924) All ER Rep 325, argument of Counsel.

17 *Bhoominathan v. Chari & Co.*, 1944 M 321.

18 *Wilson v. Strugnell*, 7 QBD 458.

19 *Re Great Berlin S. B. Co.*, 26 Ch D 616; see also *Grant v. Hobbs*, (1912) 1 Ch 717, a case under the English Moneylenders Act.

20 *Taylor v. Chester*, LR 4 QB 309: (1861-73) All ER Rep 154.

1 *Williams v. Bayley*, LR 1 HL 200: (1861-73) All ER Rep 154; see *Mutual Finance Ltd. v. Welton*, (1937) 2 KB 389: (1937) 2 All ER 657.

2 *Jones v. Merionethshire, PB Building Society*, (1892) 1 Ch 173: (1861-73) All ER Rep 227.

Where money is paid to another under the influence of a mistake an action will lie to recover it back; a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. Of course money intentionally paid cannot be recovered.³ Where, by mistake of law, a sum in excess of what was due to a beneficiary was paid to his trustee in bankruptcy, *held*, the trustee was bound to repay it.⁴ Where a tenant pays rent in ignorance of the fact that the landlord's title has determined, the former is entitled to recover back the amount.⁵ A director is bound to refund fees paid to him for the period during which he had vacated his office.⁶ So also an executor who has a right to retain his debt can recover from the assets of the testator after he has paid over such assets to the trustee in bankruptcy.⁷ When a thing is of arbitrary value the sum paid in excess of its real value cannot be recovered back, but the rule does not apply to the case of an article whose value depends upon the quantity of stuff it contains.⁸ If during the continuance of a lease the property demised be compulsorily acquired by the Government the lessee is entitled to obtain from the lessor compensation for the loss sustained by him.⁹ But where a contract relates to the manufacture of articles to be fitted to a ship, the contract being a contract for one entire job, even though payments may have been stipulated to be made from time to time, full performance of the contract having been rendered impossible by the loss of the ship, the plaintiff cannot sue for the recovery of the part of the price paid by him, because the restoration of *status quo* was impossible.¹⁰ The rule applies "where the contract is positive and absolute, and not subject to any condition either express or implied".¹¹ In such a case neither party acquires any right against the other¹² unless there is a stipulation to the contrary.¹³

7. **Contracts with corporations, etc.**—Under the English law the contract of a corporation must be under seal, but where work is done or goods are supplied and accepted by a corporation, so that the whole consideration for payment is executed, the corporation cannot keep the goods or the benefits and refuse to pay.¹⁴ The use of a seal is obligatory where it is so enjoined by

3 *Jones v. Waring & Gillow*, 1926 AC 670, 688: (1926) All ER Rep 36; *Townsend v. Crowdy*, 29 LJCP 300; relied on in *Norwich U. Fire Insce. v. Price*, 1934 AC 455: (1934) All ER Rep 352.

4 *Re Brown*, 32 Ch D 597.

5 *Barber v. Brown*, 26 LJ CP 41: (1843-60) All ER Rep 616.

6 *Re Bodega Co.*, (1904) 1 Ch 276: (1900-03) All ER Rep 770.

7 *Re Rhoades*, (1899) 2 QB 347: (1895-99) All ER Rep 333.

8 *Cox v. Prentice*, 3 M & S 344: (1814-23) All ER Rep 574.

9 *Muhammad v. Misri*, 44 A 229.

10 *Anglo-Egyptian Navigation Co. v. Rennie*, LR 10 CP 271.

11 *Taylor v. Caldwell*, 32 LJ QB 164: (1861-73) All ER Rep 24.

12 *Civil Service Co-operative Society v. General S. N. Co.*, (1903) 2 KB 756.

13 *Elliott v. Crutchley*, 1906 AC 7.

14 *Lawford v. Billericay Rural Council*, (1903) 1 KB 772, 781; *D'Arey v. Tamar Ry. Co.*, LR 2 Ex 158; *Ernest v. Nicholls*, 6 HLC 401.

statute.¹⁵ Similarly, it has been laid down in this country that where a contract with a corporation must be executed in a particular form, but the statutory provisions regarding the agreement have not been complied with, the agreement is invalid and not binding on either party, notwithstanding that there has been a part performance of the contract.¹⁶ In *Mahomed v. Commissioners for the Port of Chittagong*¹⁷ it was held that although the contract sued upon could not be enforced because it was in contravention of the provisions of an Act, yet the court allowed the corporation to recover *quantum meruit* for the services rendered by them to the defendants.¹⁸ Similarly, the municipality will be bound to render compensation in proportion to the advantage received.¹⁹ Where a contract with a municipal corporation was not signed by the Commissioners and not sealed as required by statute, *held*, the contract was not binding.²⁰ When the statute says that a contract to be valid must be in writing, verbal contracts, even if established, have no effect.¹ Thus, contracts to be valid and binding upon the Secretary of State must be in writing and must be signed by a person who has been specifically empowered to sign it. If not so made it is not binding upon him.² In order to bind the Secretary of State there must be a deed executed on his behalf and in his name by the proper authority.³ It is now well settled that in the absence of an express statutory provision requiring a contract under seal, the requirement of a corporate seal at common law is subject to this exception, namely, that if the work done or goods supplied, to carry into effect the purposes for which a corporation is created, are accepted by the corporation, and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation and the absence

15 *Young & Co. v. Mayor of Leamington Spa*, 8 AC 517; *Hoare v. Kingsbury Council*, (1912)2 Ch 452.

16 *Radha Krishna v. Municipal Board, Benares*, 27 A 592; *Mathura v. Ram*, 43 C 790, 814; *Mahomed v. Commissioners Chittagong Port*, 54 C 189, 210 sq.; *Ezekiel v. Annada*, 36 CLJ 109, 119; *Raman v. Municipal Council, Kumbakonam*, 30 M 290; *Sherazee v. District Council*, 1937 Rang 378; *Chairman S. B. Municipality v. Amulya*, 34 C 1030, per contra *Abaji v. Trimbak Municipality*, 28 B 66; *Municipal Board, Lucknow v. Debi Das*, 99 IC 643; *Mohamed v. T. M. Council*, 1938 M 746.

17 54 C 189; *Palaniaswami v. E. & S. Co-operative Societies*, 145 IC 412; *Dharampuram Municipal Council v. Moideen*, 149 IC 503; but see *Ariff v. Jadunath*, 58 IA 91, *referred to in Municipal Corp. of Bombay v. Secretary of State*, 58 B 660; *Municipal Committee v. Masiti*, 1933 Pesh 16.

18 Following *Lawford v. Billericay Rural Council*, (1903)1 KB 772; see also *Douglas v. Rhyl Urban District Council*, (1913)2 Ch 407; *Halsbury*, 4th ed. vol. 9, para 692.

19 *Arunachala v. Municipal Council*, 58 M 65.

20 *Chairman South Barrackpore Municipality v. Amulya*, 34 C 1030.

1 *Shivabhajan v. Secretary of State*, 28 B 314; *Srinibas v. Kesho*, 15 CWN 475; *Kinlock v. Secretary of State*, 15 Ch D 1, 7 AC 619; *Grey v. Charusila*, 38 C 53; *Ashbury v. Riche*, 7 HLC 658; *Young v. Mayor of Leamington*, 8 AC 517; *Doya Narain v. Secretary of State*, 14 C 256.

2 *Kessoram v. Secretary of State*, 54 C 969.

3 *Secretary of State v. Yadaugir*, 60 B 42; *Municipal Corp. of Bombay v. Secretary of State*, 58 B 660.

of a contract under seal does not invalidate the contract.⁴ In cases decided in Indian courts similar provisions in other Acts have been construed to be mandatory and non-compliance therewith has been held to render the agreement unenforceable.⁵ Where a contract with a municipality is not executed in conformity with statutory provisions it is void. Money cannot be recovered by a person for goods supplied or work done under such a contract.⁶ A suit for rent cannot be maintained by a municipality where the lease is not reduced to writing as required by statute, but compensation is recoverable under S. 70 for the benefit derived by the tenant by its occupation.⁷ A person procuring insurance business before obtaining licence to act as an agent is not entitled to commission on the business so procured even if he has been promised such commission on such business by an officer of the L.I.C.; sections 70 or 65 of the Contract Act has no application to such case.⁸ The Legal Practitioners Act does not debar a pleader from recovering a fee from his client when no contract in writing has been made.⁹ If it be not necessary to affix a seal to a document in order to bind a company, a mere defect in the manner of affixing the seal will not render the document invalid.¹⁰ A case of part performance is distinct from a case of executed consideration. A corporation can sue in a case of executed consideration. Where it is executory, a mere part performance of the contract will not convert the consideration into executed consideration so as to condone non-compliance with the provisions of a statute in respect of the formalities which are to be observed in entering into a contract on behalf of the corporation.¹¹

8. **Limitation.**—The limitation for a suit for recovery of “the advantage” under this section runs from the date of discovery of the agreement becoming void.¹² But the Privy Council has pointed out that the time at which an agreement is “discovered to be void,” when the cause of action to recover

4 *Lawford v. B. R. D. Council*, (1903) 1 KB 772; see also *Douglas v. Rhyl Urban District Council*, (1913) 2 Ch 407.

5 *Mahomed v. Commissionerr of the Port of Chittagong*, 54 C 189; *Municipal Committee, Peshawar v. Masiti*, 141 IC 23.

6 *Municipal Board, Lucknow v. Deb*, 137 IC 574; *Srivilliputtur v. Arunachala*, 144 IC 784; *Municipal Committee v. Masiti*, 141 IC 23; but see *Goodrich v. Venkanna*, 2 M 104.

7 *Municipal Committee, Lahore v. Miran*, 140 IC 621; *Zulaing v. Yamethin D. Council*, 10 R 522.

8 *L. I. C. v. K. A. Madhava Rao*, AIR 1972 Mad 112.

9 *Rama v. Kunji*, 9 M 375; *Thangammal v. Krishnan*, 53 M 309.

10 *Prabodh v. Road Oil Mills*, 57 C 1101 PC; *Dehra Dun E. Tramways Co. v. Jagmandar*, 43 A 1009.

11 *Municipal Corp. of Bombay v. Secretary of State*, 58 B 660; *Abaji v. Trimbak Municipality*, 28 B 66, overruled and observations in *Mahomed v. Aghore* and in *Malraju v. Venkata* 43 IA 138 described as obiter in *Ariff v. Jadunath*, 58 IA 91.

12 *Basa Kuar v. Dhun Singh*, 11 A 47 PC fold in *Udit Narain v. Mahammad*, 25 A 618; *Maung Kyi v. Kyew*, 93 IC 119.

the consideration may be said to arise under this section, in the absence of special circumstances, is the date of the agreement.¹³

66. Mode of communicating or revoking rescission of voidable contract.—The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance.—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

1. **The section.**—As a general rule, where in a contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the consideration is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.¹⁴

2. **Illustrations.**—Defendants engaged the plaintiff to write a treatise for a periodical publication. Plaintiff commenced the treatise, but before he completed it, the defendants abandoned the publication of the periodical; the plaintiff might sue for compensation without tendering or delivering the

¹³ *Annada v. Gour*, 50 IA 239, 50 C 929; *Hansraj v. Official Liquidators*, 31 ALJ 175 PC; *Gopilal v. Pandurang*, 92 IC 640; *Ram v. Mainath*, 92 IC 176; *Hansraj v. Dehra Dun M. E. T. Co.*, 1933 PC 68; *Gulam v. Mir*, 1939 N 27.

¹⁴ *Mackay v. Dick*, 6 AC 251.

treatise.¹⁵ As has been pointed out in another case,¹⁶ where a party stipulates to do a certain thing in a certain specified event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which is within the peculiar knowledge of the opposite party, then notice ought to be given to him. Where a party has the duty cast on him of fixing any matter left uncertain in a contract, be it of time or of place, and he means to insist upon the breach of such contract, he ought to show that he has fixed the particular matter or his readiness or willingness to do so. Where the defendant was bound under a contract to supply the plaintiff with coal on board the ship, either the naming of a ship or readiness and willingness to do so was a condition precedent to the plaintiff's right to recover.¹⁷ In an action by a shipowner against the charterer for not loading a cargo of coal pursuant to charterparty, the charterers were held excused from performance by reason of want of notice of the ship's arrival and being ready to load, thus preventing the charterers from loading her.¹⁸ Under a charterparty agreement the delivery of cargo and the payment of freight are concurrent acts, but where the consignee is bound by agreement to name a wharf, which he refuses to do, the shipowner is entitled to recover the amount of the freight which he would have earned but for the defendant's breach of contract.¹⁹ Where a lessor covenanted to keep the demised premises in repair, he could not be called upon to do so unless he had notice.²⁰ Where *A* promised to pay *B* a sum of money, on condition that *B* should execute a release in favour of *A* to be prepared by *A*, *A*'s failure to prepare the release made the promise to pay *B* a sum of money absolute and binding. *B* need not show readiness and willingness to execute the release.¹ A master cannot be liable for not teaching an apprentice if the apprentice will not learn. The willingness of the apprentice to learn is naturally a condition precedent to the master's teaching him.² So too if the master is not to teach the very trade or one of the several trades he has stipulated to teach, the apprentice is not bound to serve.³ The master may dismiss the apprentice when there is such conduct on the part of the latter as goes to the purpose of the employment in such a way as to render the carrying out of the contract by the master impossible. The covenants of a master and servant are independent covenants,⁴ so misconduct on the part of the apprentice would not put an end to the contract.⁵

15 *Planche v. Colburn*, 8 Bing 14: (1824-34) All ER Rep 94.

16 *Vyse v. Wakefield*, 6 M & W 442, 452: (1835-42) All ER Rep 294.

17 *Armitage v. Insole*, 19 LJ QB 202: 14 QB 728: 117 ER 280.

18 *Stanton v. Austin*, LR 7 CP 651.

19 *Stewart v. Rogerson*, LR 6 CP 424, 429.

20 *Makin v. Watkinson*, LR 6 Ex 25: (1861-73) All ER Rep 281; see *illustr.*

1 *Giles v. Giles*, 15 LJ QB 387.

2 *Raymond v. Minton*, LR 1 Ex 244; but see *Learoyd v. Brook*, (1891) 1 QB 431.

3 *Ellen v. Topp*, 6 Ex 424, 442.

4 *Waterman v. Fryer*, (1922) 1 KB 499: (1921) All ER Rep 582; *Learoyd v. Brook*, (1891) 1 QB 431: 60 LJ QB 373.

5 *Philps v. Croft*, 28 LJ Ex 153; *Westwick v. Theodor*, LR 10 QB 224.

Where the plaintiff entered into a contract for the delivery of a quantity of furniture to the defendant to be paid for half in cash and the other half by bill, and a quantity of the goods were delivered by the plaintiff, but neither the money nor the bill was given by the defendant, *held*, the contract was put an end to, and its performance being rendered impossible by the default of the defendant, the plaintiff could elect to insist on his rights under the contract or to treat the contract as rescinded and to sue for the value of the goods delivered.⁶ Of course, the court will have to determine which party it is that has not permitted the other to proceed with or complete the work, for, as a rule, in such cases both sides make allegations against each other.⁷

⁶ *Bartholomew v. Marwick*, 33 LJ CP 145: 143 ER 964.

⁷ *Pontifex v. Wilkinson*, 1 CB 75, 2 CB 349: 135 ER 464.

CHAPTER V

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

68. Claim for necessities supplied to person incapable of contracting, or on his account.—If a person, incapable of entering into a contract, or anyone whom he is legally bound to support is supplied by another person with necessities suited to his condition in life the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustrations

(a) A supplies B, a lunatic, with necessities suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessities suitable to their condition in life. A is entitled to be reimbursed from B's property.

1. The section.—The relief which is contemplated by the section is not dependent on any contract but is quite independent of it. The section does not create any personal liability, on the other hand, imposes a statutory claim against the property of the person who is incapable of entering into a contract and has been supplied with necessities suited to his condition in life. Two things are necessary under the section, namely (1) that the person against whom the suit is brought is incapable of entering into a contract, and (2) another person (the plaintiff) has supplied him, or anyone whom he (the person incapable of entering into a contract) is legally bound to support, with necessities suited to his condition in life. If the two conditions are fulfilled a ward's property would be liable to reimburse the person who has furnished necessities¹.

2. What are necessities? In law such things as are fit and proper for a minor with reference to his station in society are necessities. Clothes are necessities, but the same quantity and quality, which may be suitable and proper for one person may be very unsuitable and improper for another. The same rule will equally apply to education. An expensive education may be proper and necessary in a certain sphere of life while a more limited education may be sufficient for another. The question in these cases is, whether the articles are really useful and suitable for the party, or only ornamental. In the latter case they cannot be necessities for any one. The object of the law is to protect minors from becoming the dupes of designing persons and not to prevent their contracting for useful and suitable things². Money

¹ *Vishwanath v. Shiam*, 34 ALJ 1120.

² *Peters v. Fleming*, 9 LJ Ex 81 : 6 M&W 42, cited in *Jagon Ram v. Mohadeo*, 36 C 786.

advanced for necessary purposes may be treated as money advanced for necessities³. The class of the infant being established, the subject-matter and the extent of the contract may vary according to the state and condition of the infant himself⁴; in other words, the money should be spent on goods suited to the condition in life of the infant and to his actual requirements at the time. The creditor is entitled to stand in the position of a legal creditor⁵. An infant apprenticed to an auctioneer is liable to pay the premium⁶. A boxing contract has been held to be binding⁷. An infant entering into a contract of service is free to leave it. Another person inducing him to do so commits no actionable wrong⁸. If upon a consideration of the whole of the contract there is a manifest advantage to the infant he cannot avoid it. If, therefore, there is a contract, falling within a class to which the doctrine of necessities applies, and if, taken as a whole, it is for infant's benefit, the infant is liable for damages in the event of his repudiating or declining to perform the contract entered into. Necessaries include the expenses of education and instruction suited to the social state in which the infant is and in which he may expect to find himself when he becomes an adult. An infant's contract for necessities is binding even if it be partly executory⁹. The question of benefit for the minor may embrace considerations covering the minor's mother, widow or daughter¹⁰. An infant who has a sufficient income may nevertheless enter into any reasonable contract for necessities upon credit¹¹. An infant can be sued upon a single bond, *i.e.*, a bond without a penalty, given for necessities supplied to him, provided it is shown that the thing, for the price of which the action is brought, was necessary and that the charge made for it was reasonable. Food, clothing, education, instruction in a trade if the infant is to live by his own exertions, are necessities for an infant¹². A contract for the payment of debts incurred by the minor's father as also for the performance of the funeral rite of the father is binding on the minor. Money spent on the obsequies of the father of the minor cannot be deemed to be necessities supplied to the minor¹³. Money lent to a minor for the satisfaction of his father's debt cannot be called necessities and cannot be recovered under this section¹⁴. Money borrowed by a minor for the payment of Government revenue is borrowed for a legal

3 *Meenakshi v. Ranga*, 139 IC 383.

4 *Chapple v. Cooper*, 13 LJ Ex 286 : 13 M&W 252.

5 *Daw v. Nyi*, 1938 R 359.

6 *Walter v. Everard*, (1891) 2 QB 369. No action will lie against the infant for failing to serve as apprentice and the contract cannot be specifically enforced, *Pollard v. Rouse*. 33 M 288. The term "necessaries" is not confined to articles necessary to support life only, *Ryder v. Wombwell*, LR 3 Ex 90 : 4 Ex 32 : 32 LJ Ex 8, folding *Peters v. Fleming*, 6 M&W 42 : 9 LJ Ex 81.

7 *Doyle v. W. C. Stadium*, (1935) 1 KB 110 : (1934) All ER Rep 252.

8 *Maing Nyi v. E. E. Films*, 1939 R 266.

9 *Roberts v. Gray*, (1913) 1 KB 520 : (1911-13) All ER Rep 870.

10 *Ranga v. Naga*, 1933 M 890 FB.

11 *Burghart v. Hall*, 8 LJ Ex 325.

12 *Walter v. Everard*, (1891) 2 QB 369 : 60 LJ QB 738.

13 *Bechu v. Baldeo*, 145 IC 180.

14 *Nilkanath v. Chandrabhan*, 64 IC 851.

necessity and binds the estate of the minor¹⁵. When the management of the estate of a minor has been taken up by the Court of Wards a suit on a contract for the price of necessities supplied can be maintained¹⁶. In the case of a sale of articles to an infant, his liability to pay for them depends on the question whether they may be considered to have been necessities for him¹⁷. Articles of mere luxury can never come under the category of necessities¹⁸. Thus, studs set with jewels and a gilt goblet for presentation were held not to be necessities for an infant moving in what is called the highest society¹⁹. If an infant is already plentifully supplied with the thing purchased it does not fall within the description of necessities²⁰. Where the property of a minor was threatened to be attached and there was imminent danger of the same being sold, money advanced to the minor and applied to avert the danger constituted necessities. The term thus includes money urgently needed for the requirement of minors¹. A suit lies on a contract made on behalf of a minor effecting an insurance of his property against fire². The question of what are "necessaries" is not a pure question of law but is a mixed question of law and fact and cannot be allowed to be raised for the first time in second appeal³. The infant's need of things may also depend upon the special circumstances under which they were bought and the use to which they were put, *e.g.*, articles purchased by an infant for his wedding would not be deemed necessary under ordinary circumstances. Again, the mere fact that an infant has a father, mother or guardian does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor his guardian did anything towards his care or support⁴. Money advanced for necessities to a minor can be recovered with interest⁵. When a minor executes a promissory note for debts contracted during minority, the burden of proving that the debts were not for necessities is on the minor⁶.

3. **Legally bound.**—When a man marries he contracts an obligation to support his wife according to his station and condition in life and, by construction of law, he gives her authority to pledge his credit for her support under any circumstances which make it necessary to do so, she herself not being in fault. The husband is liable for necessities supplied to his wife during the period that he was insane⁷.

15 *Lachhi Ram v. Prahlad*, 84 IC 580.

16 *Umrao v. Banarsidas*, 101 IC 702; *Vishwanath v. Shiam*, 34 ALJ 1120; per contra *Girdhari v. Baldeo*, 16 Lah 932.

17 *Srinivasa v. Balasubramania*, 94 IC 534.

18 *Chapple v. Cooper*, 13 LJ Ex 286; *Montague v. Espinasse*, IC & P 356.

19 *Ryder v. Wombwell*, LR 4 Ex 32; LR 3 Ex 90; 32 LJ Ex 8.

20 *Johnstone v. Marks*, 19 QBD 509, *referred to in Jaramull v. Mohadev*, 36 C 768; *Barnes v. Toye*, 13 QBD 410.

1 *Mahmud v. Chinki*, 52 A 381.

2 *G. A. I. Co. v. Madan*, 1955 B 353.

3 *Tulsiram v. Anusuya*, 78 IC 380.

4 *Joyram v. Mahadeb*, 13 CWN 643, where the whole law is elaborately discussed with reference to authorities.

5 *Raja v. Mahboob*, 1940 M 106.

6 *Karim v. Jaikaran*, 1937 N 390.

7 *Read v. Legg*, 20 LJ Ex 309.

4. **To be reimbursed from property.**—It is clear from the Act that an infant is not liable even for necessities, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against the property⁸. A trustee *bona fide* advancing a sum to an infant apprentice out of a fund to which the infant's interest is still contingent is entitled to recover it from the estate of the infant⁹. Similarly, in the case of a lunatic, whenever necessities are supplied to him the law implies an obligation on the part of such a person to pay for such necessities out of his own property¹⁰.

5. **Expenses of litigation.**—Costs of a proper suit or defence of a suit in which an infant's property is involved are recoverable from the minor's estate as necessities¹¹. But such costs were not allowed to be recovered from the infant in *Branson v. Appasami*¹² on the grounds (1) that there was not, and in law could not be, any contract between the solicitor claiming the costs and the minor; and (2) that the services, in respect of which the suit was brought, were not accepted, but repudiated by the infant on attaining majority. So also where the professional services rendered by a lawyer were not necessary or manifestly beneficial to the minor, a suit would not lie for the recovery of remuneration for such services¹³. Where, however, a criminal charge was pending against an infant and his liberty was in jeopardy, money borrowed by him for conducting his defence was borrowed for necessities within the meaning of the section, and he was, accordingly, liable on the contract¹⁴.

6. **Loans by guardians, managers of temples, etc.**—When a loan is taken by a guardian on behalf of a minor, for the purpose of some necessity or for the benefit of a minor's estate, the estate will be liable¹⁵. Where expenditure has been incurred by the natural guardian on behalf of a minor, and where that expenditure is necessary in the sense that it is an expenditure which should have to be met by persons in the social position of the minor, the expenditure will be considered to be necessities, provided the guardian was obliged by justifying circumstances to borrow the money. The property of the minor will be liable, he cannot be made personally liable¹⁶. Money borrowed for the improvement of the minor's property is not binding on his estate but that spent on its upkeep is¹⁷. A guardian cannot execute a valid mortgage of the ward's properties¹⁸, nor effect an agreement of sale to dis-

8 *Mohori Bibee v. Dhurmodas*, 30 LA 114

9 *Worthington v. M'Crear*, 23 Beav 81.

10 *Re Rhodes*, 44 Ch D 94, 105 : (1886-90) All ER Rep 871.

11 *Watkins v. Dhunoo*, 7 C 140; what if the infant's suit be unsuccessful? *Venkata v. Timayya*, 22 M 314.

12 17 M 257; *Sadasheo v. Hira*, 1938 N 65.

13 *Sundararaja v. Pattanathusami*, 17 M 306.

14 *Sham v. Chowdhry*, 21 C 872.

15 *Phalaram v. Ajyub Khan*, 49 A 52, *refing.* to *Krishna v. Nagamani*, 39 M 915; *Bhawal Sahu v. Baijnath*, 35 C 320; *Swami v. Natesa*, 1933 M 710; *Sadasheo v. Hira*, 1938 N 65.

16 *Jodhi v. Chhotu*, 95 IC 548.

17 *Lornie v. Sait*, 1939 M 414.

18 *Maung Thin v. Saw*, 146 IC 922.

charge the minor's debts¹⁹, unless there is actual pressure on the estate²⁰. He cannot bind his ward personally by a simple contract debt. The liability of the minor's estate arises not *ex contractu* but because the money borrowed has been expended on necessities; it is immaterial whether in such a case any bond has been executed by the minor or his guardian or whether no bond has been executed at all¹. A minor is not liable on a contract made by his mother but he is liable for any sum of money spent on procuring necessities for him². If a person dealing with the guardian of a minor do make enquiries and act honestly, the real existence of an alleged necessity is sufficient to validate the debt, he is not bound to see to the application of the money³. A guardian can, under Hindu law, bind a minor's estate by a personal contract if circumstances such as those pointed out in *Hunoomanpersaud's case*⁴ exist. Pre-existing liability alone is not sufficient to enable a guardian to enter into a contract binding on the minor⁵. In the absence, of course, of evidence to show that a sum borrowed by the guardian was borrowed to meet certain necessary expenses on behalf of the minor, the minor's estate will not be liable by a mere recital in a deed⁶. Creditor advancing money under an order of the court authorizing the guardian to raise a loan on the security of the infant's estate is not bound to inquire into the necessity for the loan⁷. A sale of immovable property of a minor may be made by the guardian for necessity or for the benefit of the estate⁸. The rule that a minor is not personally liable on a contract entered into on his behalf by his guardian is subject to two exceptions: (i) when the contract is for necessities supplied on behalf of the minor or money advanced for such supplies; and (ii) when the liability is such as the minor is liable to under the personal law to which he is subject. In these two cases a decree can be passed against the estate of the minor. The creditor must prove the circumstances of the minor's estate, the absence of any other source from which the necessity can be met, and the suitability of the necessity having regard to the social status and the condition in life of the minor⁹.

A Hindu deity is not to be regarded as a minor for all purposes; therefore, this section has no application to the case of a deity of a temple. In the case of a contract of service or purchase of goods, the temple property will be liable if the thing contracted for is for a proper thing to be obtained with the income of the endowment or is suitable or appropriate to be done¹⁰.

19 *Medava v. Vadla*, 1933 M 364.

20 *Revula v. Revula*, 1938 M 322.

1 *Shiriniwas v. Babaram*, 145 IC 350.

2 *Yadorao v. Chandu*, 101 IC 255.

3 *Kandhia v. Munna*, 20 A 135, fold in *Raghubans v. Indarjit*, 45 A 77; *Rajbulla v. Bishun*, 1935 P. 74.

4 6 MIA 393.

5 *Ramanathan v. Palaniappa*, 1939 M 776.

6 *Hira v. Sunder*, 126 IC 509.

7 *Benaras Bank v. Dip*, 1936 A 72.

8 *Hemraj v. Nathu*, 59 B 525, see as to meaning of 'benefit of estate'.

9 *Sadasheo v. Shankar*, 175 IC 494.

10 *Ananta v. Prayag*, (1937) 1 C 84.

7. Marriage and funeral expenses.—Money borrowed for the purpose of discharging an infant's marriage expenses suited to his status and condition of life constitutes necessities¹¹, but the question has been regarded as doubtful in *Sadhu v. Sadhu*¹² and it has been laid down that expenses of marriage incurred by the mother cannot be recovered from the father. Of course, the infant's estate is liable only for the sum actually spent on his marriage expenses and not for any larger amount that may have been borrowed by his parents or guardian¹³. Provision for the reasonable expenses of a sister's marriage is a matter of necessity for her minor brother¹⁴. A person spending money on the marriage of a Moslem minor girl is entitled to recover it from her parents¹⁵.

69. Reimbursement of person paying money due by another in payment of which he is interested.—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bengal, on a lease granted by *A*, the zemindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B*, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid.

1. The section.—The section has its origin in the principle laid down in *Dering v. Winchelsea*¹⁶. The section deals with reimbursement and not contribution¹⁷. It has no application where no payment has been made¹⁸, nor where a party is not merely interested in the payment but is himself bound to pay it¹⁹. The section does not apply to claims for contribution arising under section 82 of the Transfer of Property Act; the expression refers to a contractual obligation and not to a legal one²⁰. A person incompetent to transfer property stands on the same footing as a minor or lunatic but this section is of no help to a transferee in such a case, because the section presumes a contract.¹

11 *Pathak Kali v. Ram Deni*, 42 IC 963, *Vaikuntan v. Kallipiram*, 26 M 497 fold; but see *Khimiji v. Laljee*, 1941 B 129; *Hairoon v. U. I. L. Assce*, 1947 M 122; *Shrinivas v. Babu*, 1933 N 285.

12 1950 M, 274.

13 *Yadorao v. Chandudas*, 101 IC 255.

14 *Nandan Prasad v. Ajudhia*, 32 A 325 FB; *Jai Indra v. Dilraj*, 61 IC 278; *Sadasheo v. Hira*, 1938 N 65.

15 *Rahima v. Sherfuddin*, 1947 M 155.

16 1 Cox 311; 2 Wh & TLC See s. 43 note 4.

17 *Gopi v. Raghu*, 1949 P 522.

18 *Bhikam v. Sant*, 1933 O 478.

19 *Naicken v. Chetty*, 1950 M. 343.

20 *Kanchithapatham v. Palamalai*, 32 MLJ 347; see *Jagapati v. Ared*, 39 M. 795; *Biraj v. Purna*, 1939 C 645.

1. *Nathibai v. Wailaji*, 169 IC 675, refing to *Mohori Bibi v. Dhurmodas*, 30 IA 114.

2. **Right of reimbursement when arises.**—Apparently the section makes a distinction between a person interested in the payment of money and a person bound by law to make it. Ordinarily nobody can make himself the creditor of another by paying that other's debt against his will or without his consent². In a suit under the section it is essential that there should be, first, a person who is bound by law to make a certain payment; secondly, another person who is interested in such payment being made; and thirdly, a payment by such last-mentioned person. A debt for money paid arises where a person has paid more for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or promise to pay is then implied in law, without actual agreement to that effect³. Thus, where a judgment-debtor executes a simple mortgage bond in satisfaction of a decree for costs passed against him and another jointly, a suit for contribution will not lie at his instance against the other, as he is not actually out of pocket⁴. The section applies to payments made *bona fide* for the protection of one's interest. A person may be interested in the payment, but if in making the payment he is not actuated by the motive of protecting his own interest and makes it voluntarily or gratuitously he cannot recover⁵. It is not necessary that there should be any contract or privity between the obligor and the obligee, nor need there be circumstances from which a contract to indemnify may be inferred. It is enough if the two conditions, namely, an original liability to pay and its discharge by a person interested to pay, are fulfilled⁶. A party who is not bound to pay on paying a decretal amount may recover it from the judgment-debtor; this right may be kept separate from his right of subrogation under the Transfer of Property Act⁷. The court must be satisfied of the abundant good faith of the person claiming reimbursement⁸. The section contemplates only those cases where the payment is made by a person under no legal liability to make it and for another person who is bound in law to pay it⁹. If in making the payment a person has acted as a reasonable and prudent man would act under the circumstances he will be entitled to recover¹⁰.

In order to succeed under this section the plaintiff must establish (1) that he was interested in the payment of the money; and (2) that the defendant was bound by law to pay. The section has no application where it is the duty of the plaintiff and not that of the defendant to pay¹¹. Neither this section nor the next refers in any way to remedies against a wrong-doer¹².

2 *Johnson v. Royal Mail Steam Packet*, LR 3 CP 38 : 37 LJ CP 33.

3 *Eastern Mortgage Co. v. Muhammad*, 52 C 914; *Tulsa Kunwar v. Jageshar*, 28 A 563; *Kemp v. Finden*, 13 LJ Ex 137; *Baluwant v. Tulsa*, 1937 N 225.

4 *Raghubar v. Abdul*, 161 IC 152.

5 *Smith v. Dinanath*, 12 C. 213; *Desai v. Bhavabhai*, 4 B 643, 652; *Ashutosh v. Sarojini*, 35 CWN 1136.

6 *Chaturbhuj v. Chandirmool*, 5 IC 705.

7 *Savitribai v. Nanhelal*, 148 IC 815; see *Hari v. Gyani*, 1944 N 282.

8 *Saradamba v. Pattabhiramayya*, 60 MLJ 13, *Dakhina v. Saroda*, 20 IA 160 fold.

9 *Parashram v. Bondrusa*, 76 IC 57.

10 *Jhanku v. Rewati*, 19 ALJ 73; see *Shiblal v. Munni*, 19 ALJ 840.

11 *Muhammad v. Sheonandan*, 111 IC 243.

12 *Kanahaya Lal v. National Bank*, 40 IA 56, 66.

Cases falling within the provisions of these two sections are cognisable by the Small Causes Court¹³. Where the requirements of the section are satisfied and payment has been made in order to clear off an existing charge or a mortgage debt the right of reimbursement has never been denied. This right is not intended to be taken away by the Transfer of Property Act¹⁴.

3. Another person.—The words “another person” in the section seem to indicate that the person making the payment is himself under no legal liability to make it. The section is intended to afford to a person who pays the money in furtherance of some existing interest an indemnity in respect of the payment against any other person who, rather than he, could have been made liable at law to make the payment. It is not correct to say that a person cannot be said to be “interested in the payment of money” unless he was at the same time entitled to some legal interest in the property in respect of which such payment might be made. The words do not presuppose the existence of a legal proprietary interest in respect of which the payment is made. The words ‘bound by law’ do not exclude those obligations of law which arise *inter partes* whether by contract or tort, and is not confined to those public duties which are imposed by statute or general law.¹⁵

4. Interested in the payment of money.—A party must be under a contract to pay or must have an interest in the property on the date of payment¹⁶. But the possession of a legal proprietary interest is not necessary. It is enough if the payment is made in furtherance of some existing interest¹⁷. A person is interested in making a payment within the meaning of the section when there is reasonable apprehension of loss or inconvenience and even detriment assessable in money¹⁸; he may also be legally liable to pay, though for the purposes of this section it is sufficient if the payment be made under an honest belief that his interest requires him to make the payment¹⁹. Thus, a declaration by a competent court, in favour of the person making the payment, that his interest will not be affected by the sale, is not sufficient to take away his “interest” in making the payment²⁰. But if the plaintiff know perfectly well that he has no vestige of title under which he can make a payment he cannot recover, for the payment must be made in his own interest¹. Difficulties arise in the application of the principle to the particular

13 *Krishno Kamini v. Gopi*, 15 C 652.

14 *Durga v. Ambika*, 54 C 424.

15 *Jinnat Ali v. Fateh Ali*, 15 CWN 332; *Motichand v. Bajrang*, 17 IC 45; *Jagapatiraju v. Sadrusaniama*, 39 M. 795; see above note; *Govindram v. State of Gondal*, (1950) 2 MLJ 1 PC (substitute in place of P. 494 Para 3 commentary).

16 *State of Gondal v. Govind*, 1945 B. 187.

17 *Govind v. Gondal State*, 1950 PC 99.

18 *Subramania v. Rungappa*, 33 M 232; *Smith v. Dinanath*, 12 C 213; *Tulsa v. Jageshar*, 28 A 563; *Suradhani v. Hari*, 64 IC 226; *Pankhabati v. Nani Lal*, 18 CWN 778, see cases *referred to*; *Ramanathan v. Chettyar*, 172 IC 437; *Jagannath v. Chunni*, 1940 A 416.

19 *Chaturbhuj v. Girdhari*, 1948 N 390; *Mula v. Balak*, 1938 N 459.

20 *Siti Fakir v. Chand Beva*; 32 CWN 1087; *Dakhina v. Sarada*, 21 C 142 PC; *Bindubasini v. Harendra*, 25 C 305; *Radha v. Sasthi*, 26 C 826; *Tulsa v. Jageshar*, 28 A 563.

1 *Janki v. Baldeo*, 30 A 167; *Chedi Lal v. Bhagwan*, 11 A 234; *Munni Bibee v. Triloki*, 54 A 140.

facts of a case. There is a difference of opinion among the High Courts of India as to whether a person, who makes a payment on account of another in respect of immovable property, acquires or not a lien or charge on the property so saved by way of salvage lien². The section does not require that the person who makes the payment must prove that he had such an interest as would stand the test of a judicial trial. The question that arises is whether the person who made the payment was actually interested in making the payment and made it in good faith³. A party having no interest but expecting only to establish his right as the result of a pending litigation is not entitled to recover a payment made by him under O. 21, r. 89, C. P. C. in order to set aside a sale in execution of a decree⁴. But where by a deposit made under O. 21, r. 89, C. P. C. the reversionary heir expectant upon the death of a Hindu widow had a sale set aside of some property held by the widow, then sued her for the amount deposited, whether the heir's interest was involved by the sale or not, the payment of the deposit was not voluntary⁵. A party making a payment, therefore, from an apprehended injury to his interest is entitled to be reimbursed under this section or the next⁶. The words "interested in the payment of money" do not exclude the case of a person who in addition to being so interested is also legally bound to make the payment⁷. The section does not require the person making the payment to be compellable to make it or do so at the opposite party's request. The payer must establish some interest, *i.e.*, must show that by the payment he averted some loss or detriment to himself⁸. The interest must be an existing interest which may be said to be created by the payment, or as part of the transaction in which the payment is made, or which is merely security for the payment⁹. A liberal interpretation should be put on the word "interested"¹⁰. This section and the next one are not designed for the benefit of persons who intermeddle with the affairs of others. When one person pays off a debt, which another is bound to pay, the ordinary relief that the courts can give is a personal decree against the defendants for money had and received.¹¹ When a person *bona fide* believing himself to have a claim to property pays off charges on the property, he is entitled to recover the amount when it is subsequently found that he had no interest¹². Where a puisne mortgagee pays off a prior encumbrancer he relieves the mortgagors and their property of the liability which existed on them; he, therefore, acquires a right

2 *Seth Chitor v. Shib Lal*, 14 A 273 FB; *Kinu Ram v. Mozaffer* 14 C 809 (no charge). In Madras a contrary view had been taken. In England no charge is allowed. *Munni Bibee v. Triloki*, 54 A 140.

3 *Munni Bibee v. Triloki*, 54 A 140.

4 *Nand v. Paraoo*, 42 IC 839.

5 *Pankhabati v. Nani Lal*, 18 CWN 778; *Siti Fakir v. Chand Bewa*, 32 CWN 1087.

6 *Satya Bhusan v. Krishna*, 18 CWN 1308; *Serafat v. Issan*, 45 C 691; *Sakal v. Chanderdip*, 49 IC 627; *Pankhabati v. Nani Lal*, 18 CWN 778.

7 *Umed v. Bihari*, 62 IC 310; *Vishvan v. Panna*, 1937 N 152.

8 *Mojiram v. Sagarmal*, 55 IC 60.

9 *Veeraraghava v. Lakshmana*, 25 MLJ 312.

10 *Radha v. Sasti*, 26 C 826 *refd. to*.

11 *Gopalasamy v. Nummachi*, 74 IC 416.

12 *Thakurss v. Behari*, 78 IC 177.

to be reimbursed the money which he pays for the benefit of the mortgagors¹³. Where the first mortgagee failed to pay the amount of a decree as he undertook to do, and the property on being attached and sold was mortgaged again, and the second mortgagee had the sale set aside by payment of the sale amount, by such payment he did not obtain any priority over the first mortgagee¹⁴. In order to establish a claim for repayment the interest which a plaintiff has in making the payment must be such as would be recognised by law and not an interest resting merely on grounds of sentiment or on moral or social grounds¹⁵. It is not the law that the payment of a sum due is payment by a person interested, whether the estate is in danger or not¹⁶. Where payment is made by a person who puts forward a *bona fide* claim to the property in dispute, he is entitled to the protection afforded by this section, even though it ultimately transpires, as a result of litigation, that he had not in fact, or in law, the interest, for the protection of which the payment was made. Where therefore the plaintiff claiming to be interested in some property made a deposit and had a sale set aside, he was entitled to be reimbursed even though it turned out that he had no interest¹⁷. Pecuniary interest, even in the shape of detriment or inconvenience, will entitle the plaintiff to take advantage of the section. Thus, a plaintiff is entitled to recover a sum paid by him to redeem a mortgage although there is no privity of contract between him and the defendant¹⁸. A person may be interested in payment, though he may be liable for or be bound to pay only a part of the money¹⁹. The owner of premises paying the consolidated rate, including the share of the occupier under the Calcutta Municipal Act, can recover his share from the occupier.²⁰

A party who makes a payment on behalf of another, before he can recover the amount so paid, must show that he had an interest in making the payment. Thus, a purchaser under a fictitious sale is not entitled to recover any amount paid by him to protect his alleged interest in the property purchased¹. Of course, if the purchase be *bona fide*, money paid by the purchaser to free the property purchased from attachment is recoverable from the person by whom the payment was due². "It is not in every case in which a man has benefited by the money of another that an obligation to repay the money arises. The question is not to be determined by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well

13 *Shiblal v. Munni*, 44 A 67; but see *Sri Beharji v. Manmohan*, 1939 A 24.

14 *Veeraraghava v. Lakshmana*, 18 IC 247.

15 *Jai Indra v. Dilraj*, 61 IC 278.

16 *Chandrabhaga v. Harsukhdas*, 59 IC 128.

17 *Nagendra v. Jugal*, 29 CWN 1052; see *Radhamadhab v. Sashtiram*, 26 C 826.

18 *Muthurakku v. Rakkappa*, 26 MLJ 66, 70; *Subramania v. Rungappa*, 33 M 232; *Vaikuntam v. Kallipiram*, 26 M 497 perhaps goes a little too far in laying down that an interest other than pecuniary will attract the provisions of the section.

19 *Registered Jessore Loan Co. v. Gopal*, 3 CWN 366.

20 *Bhudar Mal v. Sew Narayan*, 44 IC 669.

1 *Janki Prasad v. Baldeo*, 30 A 167.

2 *Subramania v. Rungappa*, 33 M 232.

settled that there is no such obligation in case of a voluntary payment by A of B's debt"³. The surety of the licensee of a liquor shop being compelled to pay a certain sum to the Government for arrears of licence fee can recover the amount from the licensee⁴. Where a contractor was to pay the freight, but on his non-payment the Government paid the amount, the Government was not entitled to recover the freight from the contractor as the payment by the Government was voluntary⁵. A mortgagee, or somebody on his behalf, paying revenue to save the mortgaged property from sale, can recover it from the mortgagor⁶. Personal representatives of the mortgagor when ordered by the court to pay a sum of money to the mortgagee are persons interested in making the payment⁷. As explained in *Mothoora v. Kristo*⁸, the section was intended to include cases not only of personal liability but all liabilities to payment for which owners of land were indirectly liable. A party not in possession, but only expecting to gain possession as the result of pending litigation, is not entitled to make a payment on behalf of the person lawfully liable. The doctrine of salvage cannot be invoked to the benefit of a stranger⁹. So also a person who is in wrongful possession of the defendant's property and pays the revenue cannot recover it from the defendant¹⁰. Where a person deposited the decretal amount under S. 170 (3) of the Bengal Tenancy Act alleging to be a mortgagee, but the mortgage was found not to be genuine, held he had no interest in making the payment¹¹. So also where a person believed himself to be next reversionary heir and as such made a payment, it was held that the payment was gratuitous and a claim for reimbursement would not lie, it being held that he was not such a heir¹². Where however a recorded owner of certain lands paid Government revenue in respect of the same, but it eventually turned out that his name ought not to have been recorded as owner, he was held liable to be reimbursed by the party afterwards found to be the rightful owner¹³. Of course, a party in possession is interested in maintaining that possession¹⁴. Payment pending litigation, when at the time of payment the interest of the person paying is gone, can be recovered, because the appeal is pending and there is the possibility of the reversal of the decision¹⁵. A person in possession though subsequently dispossessed by process of law is entitled to recover taxes paid by him during the time he was in possession from the defendant in whose favour the decree is ultimately made¹⁶.

3 *Ram Tuhul v. Biseswar*, 2 IA 131; *Naicken v. Chetty*, 1950 M 343.

4 *Pheku v. Ganga*, 1940 A 98.

5 *Secretary of State v. Rangaswami*, 106 IC 657.

6 *Ma Mya v. Lon*, 144 IC 392; *Murray v. M. S. M.*, 161 IC 626; *Amrit v. Mahadeo*, 1940 N 285.

7 *Murlidhar v. Nauni*, 138 IC 137.

8 4 C. 369.

9 *Nand v. Parao*, 42 IC 839, *Desai v. Bhavabhai*, 4 B 643 fold.

10 *Binda Kuar v. Bhonda*, 7 A 660.

11 *Panchkori v. Hari Das*, 34 IC 341.

12 *Sumer v. Shib Lal*, 1882 AWN 149; per contra *Bemasena v. Narayana*, 99 IC 845.

13 *Khushal Singh v. Khawani*, 1906 AWN 282.

14 *Nand v. Parao*, 42 IC 839.

15 *Radha v. Sasti*, 26 C 826.

16 *Muthuswami v. Ponnayya*, 51 M 815; *Nagendra v. Jugal*, 29 CWN 1052.

As has been observed by the Privy Council : "When a proprietor (in rightful possession) in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rent"¹⁷. Payment of *kist* to Government by a person in respect of land ultimately decreed to him made while possession was withheld pending an appeal, is recoverable¹⁸. Where payment is made by a person who puts forward a *bona fide* claim to property in dispute, he is entitled to the protection afforded by the section even though it ultimately transpires, as a result of litigation, that he has not, in fact or in law, the interest for the protection whereof the payment is made.¹⁹

5. Illustrations.—Where on the death of a person, his step-mother, who was entitled to maintenance and residence, took possession of his estate, though she was not his heir, and incurred certain expenses to pay her husband's step-son's debts and to meet her daughter's marriage expenses, she could recover the sums so spent by her from the reversioners²⁰. Marriage expenses are to be borne by the family property and so are recoverable¹. It is only the legitimate expenses incurred that can be recovered ; the fact that certain expenses are usually incurred will not make them binding on the defendant². Lessees paying the land revenue which by law the lessor is bound to pay³, a next reversioner paying land revenue⁴, one co-sharer paying revenue on behalf of all the co-sharers⁵, a purchaser under a foreclosure decree paying arrears of rent⁶, are entitled to be reimbursed under this section by the person liable to pay it. Where a co-sharer effected a mortgage and the mortgagee, on default in payment of Government revenue by the co-sharers, paid the same, *held*, he was entitled to recover it⁷. Where in order to remove an attachment on property for non-payment of a sum payable by the defendant, the plaintiff makes the payment, he is entitled to recover the amount from the defendant under this section⁸. A payment made by a *patnidar*⁹, or by a *darpatnidar*¹⁰, of the whole rent due on the *patni*, or by a *sub-mulgenidar*¹¹,

17 *Dakhina v. Saroda*, 20 IA 160 ; *Bhora v. Bhora*, 123 IC 335 *Quisar v. Court of Wards* 1941 L 88 ; *Subbe v. Keshava*, 1950 My 6.

18 *Chinnasamy v. Rathnasabapathy*, 27 M 338.

19 *Serafat v. Seikh Issan*, 22 CWN 347.

20 *Muthuswami v. Ponnayya*, 51 M 815.

1 *Vaikuntam v. Kallapiram*, 23 M 512, 26 M 497 ; *Ranganaike v. Ramanuj*, 35 M 728.

2 *Vaikuntam v. Kallapiram*, 26 M. 497.

3 *Faiyazunnisa v. Bajrang*, 104 IC 358.

4 *Sambasiva v. Seethalakshmi*, 19 MLJ 331.

5 *Ram Rattan v. Gaura*, 122 IC 765.

6 *Shrivallabh v. Laxman*, 1947 N 39.

7 *Moti v. Bajrang*, 16 CLJ 148 ; see *Jognarain v. Badri*, 16 CLJ 156.

8 *Tulsa v. Jageshwar*, 28 A 563 ; *Subramania v. Rungappa*, 33 M 232 ; *Chuuni v. Manik*, 97 IC 319 ; *Khushal v. Khawani*, 1906 AWN 282 ; *Nemi v. Ranga*, 1946 M 244.

9 *Smith v. Dinonath*, 12 C 213 ; *Surath v. Aloke*, 41 CWN 428.

10 *Rajani v. Haji Lal*, 21 CWN 628 ; *Khettra v. Mahomed*, 21 IC 102.

11 *Ishwara v. Ramappa*, 152 IC 201 ; but see *Secretary of State v. Fernandes*, 30 M 375 *post*.

may be recovered under the section or the next. On the date of the purchase of a revenue-paying estate there were arrears of revenue due which the purchaser was compelled to pay, *held*, in the absence of any provision in the contract of sale by which the vendor covenanted to recoup the vendee for any payment he might have to make for arrears of revenue and of the existence between them of any relation from which an obligation of the character mentioned in this section or the next might be implied, the purchaser could not recover from the vendor the money paid by him¹². A purchaser in possession of property before the execution of the sale deed is entitled to recover from the vendor the amount of rent and charges on the property paid by him (purchaser).¹³ A purchaser in execution of a decree who does not get possession can claim to be reimbursed under the section¹⁴. If a vendor has no knowledge of an encumbrance on the properties sold which the vendee has to clear off, the vendee can recover the amount paid from the vendor¹⁵. A person who makes a payment to save a sale will not get the benefit of the section unless his own interest is actually affected by the sale¹⁶. When several shares on the same lands are liable under a common burden, the discharge of the whole burden by the owner of a distinct share would give him a charge on the remaining shares for the proportionate sums they were liable for¹⁷. Where the plaintiff alleged to be a mortgagee, but the deed was held to be a forgery, deposited an amount in court to save a tenant's holding from being sold, the plaintiff could not claim to be reimbursed by the tenant as he was not interested in making the payment nor was it lawful¹⁸. A mortgagee, or somebody on his behalf paying revenue to save the mortgaged property from sale, can recover it from the mortgagor¹⁹. A person who, in order to save his own interest, has to pay the sub-mortgagee, is entitled to claim reimbursement from the mortgagee who created the sub-mortgage. If there is direct actual relation between the parties there will be no occasion to rely on this section at all²⁰. A claim by a Hindu widow for her daughter's marriage expenses is recoverable from a person legally bound to defray the amount¹. A person is entitled to obtain a refund of the money paid by him if he shows that in execution of a decree against the family properties certain property belonging to him exclusively is threatened to be attached and to prevent such attachment he made the payment². A husband is liable for the costs of his wife's burial even though she lived apart from him and was buried by a person in whose house she died³. Where a limited owner of property purports to make a conveyance of an absolute interest in it and

12 *Dost Muhammad v. Ahmad*, 6 A 67.

13 *Sinithamani v. Arunachalam*, 107 IC 412.

14 *Bansi v. Shiv*, 1933 A 908.

15 *Ram v. Bakhtawar*, 70 IC 802.

16 *Khetra v. Mahomed*, 19 CLJ 525; *Baikunto v. Udoy*, 2 CLJ 311.

17 *Puthenpurayil v. Mangalaseri*, 15 IC 262.

18 *Panchkori v. Hari*, 34 IC 341.

19 *Ma Mya v. Lon*, 144 IC 392.

20 *Subbakke v. Anthamma*, 153 IC 318.

1 *Visalakshi v. Kali*, 53 IC 796.

2 *Muthusami v. Angayaka*, 54 IC 807.

3 *Bradshaw v. Beard*, 31 LJCP 273; 142 ER 1175; 12 CBNS 344.

the property in the hands of the transferee is ordered to be sold for arrears of rent at the instance of the superior landlord, a payment made by the heir of the transferor is one made under this section or the next⁴. A creditor decree-holder is interested in making a payment of arrears of rent in order to save the property for the recovery of his own decree. His interest as a judgment-creditor is sufficient to entitle him to make the payment⁵. Same is the position of the reversionary heir expectant upon the death of a Hindu widow⁶. A person who is compelled under a decree to pay money which another is ultimately liable to pay is entitled to recover it from such other person⁷. Where a payment is made by the purchaser of certain property in order to prevent it from being sold in execution of a decree, the purchaser is entitled to recover the sum from the owner of the property⁸. When a *patni* tenure is sold for arrears of revenue and the purchaser pays the arrears of rent to the zemindar, and the sale is afterwards set aside, the money so paid under a mistake of fact may be recovered⁹. Where a landlord brought to sale a *jote*, a previous purchaser of the *jote* depositing the decretal amount and having the sale set aside is entitled to recover the amount from the defendant less the amount of 5 p.c. compensation¹⁰. Where the plaintiff, who held the *patta* for the land in suit, took four tenants and it was finally decided that they had all occupancy rights in the land and the plaintiff paid the whole of the rent, he was entitled to contribution from the tenants¹¹. A purchaser of property charged with the payment of money on a certain contingency is a person interested in the payment of money and on making the payment he can recover the amount from the vendor¹². The sum of money which the purchaser of property is bound to pay to encumbrancers, when the contract is to convey the property free from encumbrances, may be recovered from the vendor¹³. Where the plaintiff alleged to be a mortgagee of a tenancy which was about to be sold in execution of a rent decree, but the mortgage was found not to be genuine, he was not interested in making the payment¹⁴. A suit by a lambardar against his co-sharers for recovery of revenue paid by the former on default by the co-sharers is an ordinary suit for contribution and in the decree the liability of each co-sharer should be specified¹⁵. A lambardar is entitled to recover the sum paid by him to the lessee¹⁶. Where under the terms of a deed of release, forming part of the settlement of accounts on dissolution of a partnership business, a partner undertakes to pay off certain debts, but on account of his default the other partner is obliged to pay the

4 *Bama Sundari v. Adhar*, 22 C 28.

5 *Abid v. Ganga*, 113 IC 441.

6 *Pankhabati v. Nani Lal*, 18 CWN 778.

7 *Vishram v. Panna*, 169 IC 298.

8 *Ajudhia v. Baker*, 5 A 400; S. 70 also applies.

9 *Nagendra v. Chandra*, 5 CLJ 59; per contra *Abdul v. Sir Bijoy*, 54 CLJ 302; 1932 C 108.

10 *Bhadra v. Gunamoni*, 11 IC 155.

11 *Kotayya v. Kotappa*, 49 MLJ 117.

12 *Ganga v. Shiam*, 127 IC 244.

13 *Bhagwati v. Banarsi*, 50 A 371 PC.

14 *Panchkori v. Hari*, 21 CWN 394.

15 *Arjun v. Rudra*, 11 IC 674.

16 *Bhora v. Naurang*, 28 ALJ 1103.

same, he is entitled to indemnity from the other partner¹⁷.

6. **Bound by law.**—The words extend to any obligation (whether in contract or in tort) which is an effective bond in law¹⁸. The expression does not mean bound by law to the plaintiff, but the defendant at the suit of any person may be compelled to pay¹⁹. The words "bound by law" do not restrict the section to liabilities created by statute only, such as liabilities to pay revenue, but include liabilities which arise out of contracts by parties²⁰. Even where a person is not under a contract legally bound to make a payment, but if he is only interested in making the payment, he will be entitled to be reimbursed under this section¹. "The person who is interested in the payment mentioned in sec. 69 must be a person who, as between himself and the defendant, was not bound to pay, though the defendant may be under an obligation to pay to a third party"². The words 'bound by law to pay' include all cases of persons legally bound to pay whether under a contract or otherwise, and, in the case of a contract, whether it is enforceable by the person to whom the payment is to be made or not³. A person bound by law to pay is always a person interested in the payment though the converse may not necessarily be true⁴.

Payment in law means payment to another person. Therefore, where the Government, as *mulgeni* tenant, paid the assessment in order to avert a sale for arrears of revenue, *held*, the Government did not pay the sum in question to anyone, and it could not be said to have any interest in making the payment, for the sale in default of payment could only take place under its own orders, therefore the claim of the Government to recover the amount was negatived⁵. A registered owner paying revenue due on land cannot recover it from one who is not the registered holder, because the latter is not bound to pay it under the Madras Revenue Recovery Act, II of 1864, S. 35, though it may be to his interest to do so⁶. Where income-tax was levied on A, and A on the allegation that the income was enjoyed by B sought to recover it from B, *held*, as B was not assessed for its payment, A's claim was not maintainable whether under this section or under S. 70.⁷ A second mortgagee in redeeming a prior mortgagee cannot claim to be reimbursed in respect of any payment made by him in satisfaction of a decree for rent obtained against the mortgagor by the superior landlord, for the first mortgagee is under no liability to pay the rent due to the superior landlord.⁸ But where a mortgagee

17 *Veerappa v. Chetty*, 39 CWN 438 PC reld. to in *Kuppuswamy v. Rasappa*, 170 IC 7.

18 *Govind v. Gondal State*, 1950 PC 99.

19 *Somashastry v. Swamirao*, 42 B 93, 98.

20 *Mothooranath v. Kristo*, 4 C 369 fold in *Chandradaya v. Bhagaban*, 23 CLJ 125; *Joychand v. Dolegobinda*, 1944 C 272; *Chengal v. Udai*, 1936 M 752; *Augne v. Sidhgopal*, 1940 A 214; *Biraj v. Purna*, 69 CLJ 550.

1 *Abid Hussain v. Ganga*, 113 IC 441.

2 *Jagapati v. Sudrusannama*, 39 M 795, cited in *Rasappa v. Doraiswami*, 49 MLJ 88.

3 *Umed v. Bihari*, 62 IC 881; see *Jai Indra v. Dilraj*, 61 IC 278 cited ante.

4 *Chaturbhuj v. Girdhari*, 1948 M 390.

5 *Secretary of State v. Fernandes*, 30 M 375.

6 *Boja Sellappa v. Vridhachala*, 30 M 35; *Subramania v. Mahalingasami*, 33 M 41.

7 *Raghavan v. Alamelu*, 31 M 35.

8 *Gangadas v. Jogendra*, 11 CWN 403, 412.

of a share of a *patni* taluk, in order to save his interest, paid the rent and claimed to recover a share from a purchaser of the mortgagor's interest in the taluk, *held*, the mortgagee had an interest in making the payment and the purchaser was *prima facie* bound to pay the rent, therefore, under S. 69 the former could recover the amount from the latter.⁹ A person purchasing a property, subject to a charge for maintenance in favour of a widow, has no cause of action against the vendor when the charge is enforced by the widow against the property and the purchaser pays off the money to avoid a sale.¹⁰ So also a purchaser of a *patni* taluk is not entitled to recover arrears of rent paid by him to the superior landlord which accrued due while the mortgagee was in possession of the property, because the plaintiff was under the legal liability to pay the rent that was due upon the property when he made the purchase, he in fact purchased the property with the liability of the prior charges.¹¹ A decree-holder, who has purchased the property of the judgment-debtor in an execution sale, is not, on paying arrears of revenue, entitled to recover them from the judgment-debtor.¹² Where plaintiffs sued defendants for the recovery of the dues payable by the latter, *held*, the defendants were trespassers and were not persons bound in law to pay the dues, therefore, as against them the plaintiffs had no cause of action for reimbursement.¹³ A usufructuary mortgagee is liable to pay the under-proprietary rent of the holding and is, therefore, not entitled to recover it from the mortgagor.¹⁴ A purchaser who pays a debt due from a tenant to the landlord is entitled to recover the amount from the tenant.¹⁵ Under the terms of a usufructuary mortgage the mortgagee was bound to pay the zeminder the rent due for the holding mortgaged, but he failed to pay it. On the zeminder getting a decree the mortgagor paid the sum and sued to recover it from the mortgagee. The cause of action arose on payment and was independent of the mortgage. There is no limitation in the section to the effect that the liability to pay is a liability existing between the person bound to pay and the person to whom the money is paid.¹⁶ If a purchaser of property is bound to meet the claims of certain mortgagees he is entitled to be reimbursed by the vendor.¹⁷ Where the plaintiff bought the defendant co-sharer's interest in land, the latter, though in possession, is a trespasser pure and simple, so is not liable for the dues of the zeminder paid by the former in respect of the whole property.¹⁸ Under the section a person interested is entitled to recover what he pays on behalf of another who is bound by law to pay, but not what he pays to a third person who has already paid on behalf of the person lawfully bound to pay.¹⁹ A plaintiff cannot recover a payment made to improve his title but

9 *Umesh v. Khulna Loan Co.*, 34 C 92.

10 *Mangalathammal v. Narayanaswami*, 17 MLJ 250; *Nandan v. Fateh*, 1940 A 104.

11 *Manindra v. Jamahir*, 32 C 643; *Ranglal v. Kali*, 2 Pat 890.

12 *Chedilal v. Insar*, 151 IC 351.

13 *Payida v. Barrey*, 91 IC 608.

14 *Gaya v. Sada*, 48 IC 69.

15 *Mahatha v. Bandhu*, 22 IC 720.

16 *Naipal v. Bansgopal*, 25 ALJ 791.

17 *Bhagwati v. Banarsi*, 32 CWN 705 PC.

18 *Payida v. Barrey*, 91 IC 608.

19 *Prag v. Prag*, 14 ALJ 605.

which payment he is not bound by law to make.²⁰

7. Contribution.—Section 69 does not apply to suits for contribution. The section deals with reimbursement and not with contribution at all, for the person who is interested in the payment of money which another is bound by law to pay must be a person who is not himself bound to pay the whole or any portion of the money.¹ In some of the cases however it has been held that sec. 69 applies to suits for contribution, but these cases cannot be supported on the language of the section.

8. Limitation.—Art. 61 of the Limitation Act is applicable, when the case cannot be brought under Art. 132, to the claim of a person under S. 69. In *Rajah of Vizianagram v. Rajah Setrucherla*² it was held that in the absence of a charge, the only article applicable would be Art. 61, or 99 and not Art. 120. Cause of action begins to run from the date of expenditure or the date when the rightful person claims the estate. A party cannot, by holding on and keeping possession of the estate, enlarge the period of limitation.³ Limitation is 3 years⁴ from the date of payment.⁵

70. Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations

(a) A, a tradesman, leaves goods at B's house by mistake, B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously.

1. The section.—Sections 69 and 70 deal with different conditions and apply to different sets of facts.⁶ The applicability of the section does not depend upon the existence of a contract binding on the parties and it does not provide for contractual liabilities. S. 65, on the contrary, proceeds on the basis of there having been a contract. The basis of compensation under the section is not the same as on contractual rights but would be in proportion to the benefit enjoyed by the party for whom a thing was done or to

20 *Ram v. Damodar*, 1 Bom LR 371.

1 *Ramaswami v. Viswanatha*, AIR 1950 Mad 343; *Manindra v. Jamahir*, 9 CWN 670; *Jinnah Ali v. Fateh Ali*, 15 CWN 332; *Gopinath v. Raghubansh Kumar*, AIR 1949 Pat 552.

2 26 M 686; see *Annada v. Panchu*, 61 C 864 cited ante; *pallonjee v. Lonavala Municipality*, 39 Bom LR 835.

3 *Muthuswami v. Ponnayya*, 51 M 815.

4 *Tota v. Harish*, 1937 N 402.

5 *Bansi v. Shiv*, 1933, A 908.

6 *Sudhangshu v. Banamali*, 1946 C 63.

whom a thing was delivered.⁷ For the application of the section the law will presume a contract but not where there could not have been a contract, *e.g.*, because of a legal bar.⁸ The section sets out the circumstances in which a person receiving a benefit must be deemed to have impliedly agreed to pay compensation or to return the thing delivered to him. The section is an illustration of an implied contract. The basis of the suit is a contractual one, so a minor cannot be sued under it.⁹ Where a party's claim to relief is based on express agreement and no relief is asked for under the section, it is not open to the court to grant any relief.¹⁰ The scope of the section has been thus explained in *Damodara v. Secretary of State*.¹¹ By the section three conditions are required to establish a right of action by a person who does anything for another, (1) the thing done must be done lawfully; (2) it must be done by a person not intending to act gratuitously; (3) and the person for whom the act is done must enjoy the benefit of it. If all these elements co-exist, the person who does the act is entitled to claim contribution from the person on whose behalf he did the act. Where a person makes a payment in order to save his own interest as well as the interest of his co-sharer, it is not to be presumed that such payment is made for the benefit of the co-sharer¹², but such a case seldom arises. That a payment is made for a certain person, of which he enjoys the benefit, may be presumed from circumstances until the contrary is asserted and proved. In order to claim the benefit of the section it must be shown that the defendant had the opportunity of accepting or rejecting the benefit of the payment made by the plaintiff. The words 'he enjoys the benefit' must be taken to mean that he does it as the result of his volition. The plaintiff must continue to be interested in the property. The benefit should be direct. The payment must be lawful and for the defendant.¹³ A *panchayet* rendering latrine services at certain persons' request can recover the charges for them.¹⁴ The section does not contemplate a case of payment of money.¹⁵ Where the right to relief is based on an express agreement, and no relief is asked for under the provisions of this section, it is not open to the court to grant the latter relief.¹⁶ The distinction between this section and S. 51 of the Transfer of Property Act is that under the latter section the defendant gets a charge on the property, but under the former

7 *Pallonjee v. Lonavala Municipality*, 39 Bom LR 835.

8 *Nathibai v. Wailji*, 169 IC 675.

9 *Bankey v. Mahendra*, 1940 P 324 FB.

10 *Tejraj v. Ram*, 19 L 511.

11 18 M 88. This has also been pointed out in *Tangya Fala v. Trimbak*, 40 B 646; *Rajanikanta v. Rama Nath*, 19 CWN 458, 460; *Ram Tuhul Singh v. Biseswar Lall*, 2 IA 131; *Punjabhai v. Bhagwandas*, 53 B 309; *Yogambal v. Naina*, 33 M 15; *Rajani v. Rama*, 20 CLJ 200; *Chandra v. Srinivasa*, 38 M 235; *Kashi v. Nilratan*, 1947 C 304; *Muthu v. Veta*, 1947 M 117; *Chengal v. Udai*, 1936 M 752.

12 *Yogambal v. Naina* 33 M 15 *reftd.* to.

13 *Kedar v. Narayan* 34 CWN 41; *Sourendra v. Tarubala* 34 CWN 453; *Challa v. Desetti* 1950 M 817; (1950) 1 MLJ 306.

14 *Nathmal v. S. P. Committee*, 1935 N 242.

15 *Shoo v. Sarjoo*, 1943 A 220.

16 *Tej v. Ram* 19 Lah 511.

the plaintiff is bound to make a compensation to the defendant for the amount spent.¹⁷

Where a building contractor made additional constructions to the building which were not done gratuitously and upon an oral agreement claimed compensation at prevailing market rate against the owner of the plot, he was entitled to receive compensation for the work done which was not covered by the contract, even if he failed to prove an express agreement in that behalf.¹⁸ Where a building contract enables the Housing Board to stop work of the contractor and get the same done by another contractor after serving notice therefor, non-service of notice entitles the contractor to claim compensation.¹⁹

The scope of sec. 70 was discussed at great length by the Supreme Court in *State of West Bengal v. B. K. Mondal & Sons*.²⁰ There the respondent completed the construction of certain storage godowns for the Civil Supplies Department on the basis of a written contract. He also constructed additional godowns, a number of small rooms and a *kutchā* road on the oral instruction of the S.D.O. and the Asst. Director of Civil Supplies. His bill for the work done on oral instruction was not paid, and the respondent instituted a suit for the amount of the bill. The primary defence was that the verbal requests in pursuance of which the respondent claimed to have made the several constructions did not constitute a valid contract binding the Government as such requests contravened the provisions of sec. 175(3) of the Government of India Act, 1935, which required a contract by a Province to be expressed to be made by the Governor. The trial Judge held that in view of sec. 175(3) of the Government of India Act, 1935, there was no valid contract between the respondent and the appellant for making additional constructions. He, however, held that the appellant's claim was justified under sec. 70 of the Contract Act. This view was upheld by the lower Appellate Court as well as the Supreme Court.

A person whose contract is void for non-compliance with Art. 299(1) of the Constitution is entitled to compensation under sec. 70 of the Contract Act. It is, however, his duty to account to the other party for what he has received in the transaction from which his rights to restitution arise. If he fails to do so his claim for compensation or refund of deposit will be dismissed.¹ An agreement which does not comply with the requirements of Art. 299(1) is, no doubt, void; but Art. 299(1) does not stand in the way of claiming compensation under sec. 70 of the Contract Act.² Sec. 70 applies to a lease of land to the P.W.D. for dumping its coal and tar even though the

17 *Bhupendra v. Pyari*, 40 IC 464.

18 *Subramanyam v. Thyappa*, AIR 1966 SC 1034, 1036.

19 *Bombay Housing Board v. Karbhase Naik & Co.*, AIR 1975 SC 763.

20 AIR 1962 SC 779. See also *New Marine Coal Co. v. Union of India*, AIR 1964 SC 152, 155.

1 *Mulamchand v. State of M.P.*, AIR 1968 SC 1218.

2 *Green Eastern Shipping Co. v. Union of India*, AIR 1971 Cal 150, 154; *Bengal Coal v. Union of India*, AIR 1971 Cal 219.

lease is hit by Art. 299(1), provided the lease is not intended to be gratuitous. The basis of the obligation is not founded on any contract.³

The section is not to be read so as to justify the officious interference of one man with the affairs or property of another, or to impose subjection in respect of services which the person charged did not wish to have rendered. Thus, if a riparian owner were to excavate a tank against the will of the other, no suit for contribution would lie against that other person.⁴ The wide language of the section should be read with two qualifications, (1) it is not enough that the work should result in benefit to the defendant, it must have been done, in part at least, for his benefit; and (2) the defendant must have been in a position after the execution of the work to exercise his option whether or not to avail himself of the benefit.⁵ The section covers the case of a judgment-debtor making a payment under O. 21, r. 89, C. P. C. in order to set aside a sale though he is not bound to make the payment.⁶ No fiction of an implied request is necessary under the section.⁷ The section applies where the delivery is made in the absence of any express contract at all and not where the delivery is made to a third party under a contract to which he is a stranger.⁸ The section has nothing to do with the creation of a charge upon property, only a simple money decree can be obtained under it.⁹ The operation of the section may be modified in certain cases by special enactments.¹⁰

The statement of the law is derived from the notes to *Lampleigh v. Braithwait*¹¹ and perhaps indirectly from Roman law. There may be difficulties in applying a rule stated in such wide terms as those expressed in the section. According to the section, it is not essential that the act should have been necessary in the sense that it has been done under circumstances of pressing emergency, or even that it should have been an act necessary to be done for the preservation of the property. It may therefore be extended to cases into which no question of salvage enters. It is not limited to persons standing in particular relations to one another, and except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done. The section goes beyond the English law in creating an obligation to pay for services voluntarily rendered. Thus, claims have been upheld where, if the English authorities, e.g., *Leigh v. Dickeson*¹² had been followed, the claims would have been rejected.¹³ The terms of the section are unquestionably wide, but applied with discretion they enable the courts to do substantial justice in cases where it would be difficult to impute

3 *Keshab Kishore v. State*, AIR 1971 Pat 99.

4 *Fischer v. Kanaka*, 5 IC 742.

5 *Lakshmanan v. Arunachalam*, 135 IC 590.

6 *Jognarain v. Badridas*, 13 IC 144.

7 *Ajodhya v. Jannoo*, 6 IC 341.

8 *Sadik v. Mahomed*, 32 IC 511.

9 *Akbar v. Shahanshah*, 83 IC 854.

10 *Davis v. Brock-Smith*, 8 IC 1158.

11 Sm. LC 12 Ed 159.

12 15 QBD 60.

13 *Jaroo v. Basanta*, 32 C 374.

to the persons concerned relations actually created by contract. It is, however, especially incumbent on final courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are officious¹⁴. Under sec. 70 the burden is on the plaintiff to establish that the defendant enjoyed the benefit which he is bound to restore to the plaintiff. Thus where the Government conferred on D the privilege of vending toddy, not intending to do so gratuitously, the Government is not entitled to any relief under sec. 70 in the absence of any evidence adduced by the Government that D made any profit out of the contract entered into by him with the Government¹⁵. This section covers a wider ground than S. 69 and should not be invoked in the case of a benefit received under a contract. To such a case S. 65, it has been said, would be clearly the more applicable section¹⁶. The section does not apply to a case of services rendered on request or pursuant to a contract¹⁷. "To support such a suit (for repayment), there must be an obligation expressed or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid"¹⁸. The wording of the section is very wide. It may be contended that it covers the case of a benefit forced on a man against his will as long as the act conferring it is not unlawful. That some restricted meaning is to be given to the word is recognised in some cases¹⁹. But it is not necessary (1) that the beneficiary should exercise the option of accepting or declining the benefit before it is conferred, or (2) that if he enjoys it afterwards without objection he must be presumed to accept it. In other cases, however, it has been held that a person cannot be said to have enjoyed a benefit within the meaning of this section unless he has had the option of accepting or rejecting it²⁰. After all liabilities are not to be forced on a man behind his back²¹. So a mere volunteer is not entitled to the benefit of any payment he might make on behalf of a debtor²². A contractor failing to complete within time, the owner was entitled to take possession of the land with such building as had been constructed without paying anything²³. The effect of such a narrow view, it has been pointed out, would be to exclude the

14 *Suchand v. Balaram*, 38 C 1

15 *B. C. Gowda v. State*, AIR 1974 Knt. 136, 139-140.

16 *Municipal Board, Lucknow v. Debi*, 99 IC 643.

17 *Sibkisor v. Manik*, 21 CLJ 618.

18 *Ram Tuhul Singh v. Biseswar*, 2 IA 131, explnd. in *Yogambal v. Naina*, 33 M 15, distgd. in *Pheku v. Ganga*, 1938 ALJ 223.

19 *Gajapathi v. Srinivasa*, 25 MLJ 433; *Damodara v. Secretary of State*, 18 M 88; *Saptharishi v. Secretary of State*, 28 MLJ 384; *Sri Chandra v. Srinivasa*, 38 M 235, 241, 243.

20 *Yogambal v. Naina*, 33 M 15 diffd. and distingd. in *Gajapathi v. Srinivasa*, 25 MLJ 433; *Rajah of Pittipuram v. Secretary of State*, 16 MLT 375; *Palaniappa v. Rangachariar*, 28 IC 697; *Gopi v. Raghu*, 1949 P 522.

21 *Falcke v. Scottish Insurance*, 34 Ch D 234: (1886-90) All ER Rep 768, cited in *Venkata v. Timayya*, 22 M 314.

22 *Fate v. Moti*, 1935 L 523.

23 *Munro v. Butt*, 8 E&B 738.

operation of the section in all cases where statutory payments are made for the protection of property by a person who, but for such payment, might be seriously prejudiced²⁴.

Sec. 70 does not sanction recovery when the person primarily liable has no knowledge, actual or implied, that expenditure is or probably may be necessary on his behalf²⁵. Where the plaintiff without referring to the party liable and without his knowledge and behind his back makes a payment it cannot be said to have been made for the party liable¹.

2. Not intending to do so gratuitously.—Where the Government repaired a tank, which irrigated the lands in the zamindari of the defendants and also raiyatwari villages held under the Government, and it was found that the defendants knew of the repairs which were necessary for the preservation of the tank, as the defendants had enjoyed the benefit of the work done, and the Government had not carried out the repairs intending to do them gratuitously, the plaintiff was entitled to recover part of the costs incurred from the defendants².

From illustration (b) it may be inferred that if *A* saves the property of *B* from fire, and the circumstances show that *A* did not intend to act gratuitously, he is entitled to compensation. A co-sharer repairing a *hat*, pursuant to a notice by the municipality under threat of forfeiture of licence in the event of non-compliance, is entitled to contribution from the other co-sharer³. Where one of two joint tenants paid the whole amount of rent due upon their holding, the plaintiff's payment was not voluntary, so he was entitled to recover the defendant's share from him⁴. If the payment in the circumstances of a case be found to be a gratuitous one the plaintiffs will not be entitled to recover it from the defendant⁵. Where after a sale in execution of a money decree a co-sharer makes the requisite deposit in court under S. 310 A (now O. 21, r. 89) and has the sale set aside, the payment is not voluntary or gratuitous and it relieves the defendants of their liability under the decree. The plaintiff is therefore entitled to be reimbursed of the payment⁶, but not where there is no evidence to show that the payment was made for the defendant⁷. Reversioners before claiming back the estate must reimburse the purchaser from the widow to the extent of debts binding upon the estate⁸. Where the plaintiff has enjoyed the benefit of the money

24 *Suchand v. Balaram* 12 CLJ 566; *Joganarain v. Badri*, 16 CLJ 160.

25 *Muthu Raman v. Chinna Vellayan*, 39 M 965.

1 *Tangya Fala v. Trimbak* 40 B 646; *Sri Chandra v. Srinivasa*, 38 M 235, 241, 243.

2 *Damodara v. Secretary of State*, 18 M 88; there was no request on the part of the zeminder, though it was possible that if the facts were properly ascertained, a request might have been implied. According to English authorities the action must have failed, see the case explained in *Yogambal v. Naina*, 33 M 15; *Srinivasa v. S. of S.*, 1943 M 85 FB; *Chengal v. Udai*, 1936 M 752.

3 *Jarao v. Basanta*, 32 C 374; *Bibi Baratan v. Chandramani*, 167 IC 42.

4 *Nirdosh v. Jakaria*, 27 IC 334.

5 *Suraj v. Hashmi*, 40 A 555; *Banwari v. Rajkishore*, 1946 N 21.

6 *Dori Lal v. Patti Ram*, 8 ALJ 622; *Batuk v. Bepin*, 16 CWN 975.

7 *Yogambal v. Naina*, 33 M 15.

8 *Dhanu v. Ajodhiya*, 1934 P 327.

laid out by the defendant in clearing a jungle and making the land fit for cultivation, not intending to do so gratuitously, the defendant is entitled to claim contribution from the plaintiff⁹.

A tenant satisfying a rent decree by paying the amount due for the entire estate can recover it from his co-tenant¹⁰. A contract between a pleader and his client for the payment of his fees must be such as will satisfy S. 28 of the Legal Practitioners Act. If the pleader does the work merely on the understanding that he will, in the ordinary course of events, be paid, he may have a good claim against the client under this section¹¹. Where payments were lawfully made to lawyers by the executors of a deceased *sebait*, with no intention to do so gratuitously and the *debutter* estate enjoyed the benefit of the payment, the estate was liable to make good such payment¹². Where plaintiffs delivered goods to a municipal committee in excess of the quantity ordered, the contract not being under seal and not binding on the committee, the plaintiffs were entitled to the price of the goods delivered as it would not be fair to ask them to remove the goods after the lapse of a long time¹³. Where the plaintiff, who was recorded as *lambardar* of certain property, paid the revenue on citation being issued by the Revenue authorities but at the same time sold his property to the defendants who were therefore liable to pay the revenue, the payment was not gratuitous and was recoverable¹⁴. On the imposition of a duty by the Government which is payable by the parties under S. 10 of the Tariff Act, the seller may add the amount equivalent to the duty to the contract price¹⁵. Where the plaintiff and the first defendant were before partition members of a joint Hindu family and were entitled to certain shares in a mortgage, the plaintiff called upon the first defendant to join him in filing a suit on the mortgage but receiving no answer from him made him a *pro forma* defendant, but he later on was made a co-plaintiff on his own application, the plaintiff was entitled to contribution in respect of costs from the other party¹⁶. If a person by *subpoena* is compelled to give evidence at a trial it is only reasonable to imply a promise to pay him his expenses¹⁷. Where a promissory note being insufficiently stamped fails to take effect as such, the creditor can treat the contract as non-existent and ask for refund¹⁸. Where a mortgagee auction-purchaser buys the mortgaged property charged with arrears of rent, on payment of such arrears to the superior landlord in order to prevent a sale of property, he is not entitled to be reimbursed by the mortgagors¹⁹. Under O. 21 r. 89 the amount

9 *Bhupendra v. Pyari*, 40 IC 464.

10 *Hari v. Rama*, 60 IC 414.

11 *Mohendra v. Akhil*, 20 IC 47.

12 *Peary v. Narendra*, 9 CWN 421.

13 *Ram v. Municipal Committee, Lahore*, 145 IC 687.

14 *Pokhpal v. Lall Madho*, 51 A 897, *Nath v. Baijnath*, 3 A 66 FB reld. to.

15 *Trikamlal v. Kalidas*, 21 B 628.

16 *Sundara v. Anantha*, 43 MLJ 271.

17 *Nemai v. Ajahar*, 8 CWN 178.

18 *Udaram v. Laxman*, 104 IC 470.

19 *Moharanee v. Harendra*, 1 CWN 458.

paid must be taken to have been deposited voluntarily and therefore no suit would lie for its recovery²⁰. Where a co-mortgagor discharges the whole of the mortgaged debt on a property, the other mortgagors cannot claim possession of their shares without payment to the co-mortgagor. The section is not confined to cases where a service is rendered to another under compulsion or in circumstances of pressing necessity¹. Where no agreement has been made by one expressly about the fees to be paid to a doctor, he is entitled to a reasonable remuneration². Under a contract if the old rates of work are abandoned and no new rates are settled, the party doing the work is entitled to charge reasonable market rates. The general principle is that where one has expressly or impliedly requested another to do him a service without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay *quantum meruit*, i.e., so much as the party doing the service has deserved³. *Quantum meruit* is based on a quasi-contract and not on any express agreement. Where a party to a contract has wholly or partially performed his obligation he may neglect the contract and sue upon a *quantum meruit*. But where the contract has not been ignored or repudiated and a claim is based upon the terms of the contract, the principle of *quantum meruit* cannot be evoked⁴. Where under a contract the client promised to pay lump sum remuneration to his solicitor if he completed sale of his premises but the sale could not be completed due to breach on the part of the purchaser, the solicitor cannot recover the remuneration as the sale was not completed and sec. 70 cannot apply as there was an express contract, nor can sec. 56 apply as breach on the part of the purchaser could be foreseen by the parties and did not lead to an impossibility of performance by the solicitor⁵.

Compensation *quantum meruit* is awarded for work done or service rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation *quantum meruit* cannot be awarded where the contract provides for the consideration payable in that behalf. *Quantum meruit* is but reasonable compensation awarded, on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract cannot be displaced by assuming that the stipulation is not reasonable⁶. Prices for described items of work include all ancillary work which may be necessary for the completion of the described work. But a totally different work not being ancillary or incidental work calls for a different rate outside the contract. To such a claim in respect of a totally different

20 *Shankarrao v. Vadilal*, 35 Bom LR 462; *Raghu v. Deokali*, 7 Pat 30; *Kummakutty v. Neelakandan*, 53 M 943; but see *Suchand v. Balaram*, 38 C 1.

1 *Jauhari v. Tunde*, 54 A 975, 906; see *Palaniappa v. Rangachariar*, 28 IC 697.

2 *Lack v. Gallagher*, 25 IC 777.

3 *B. N. Ry. v. Ratanji*, 62 C 175.

4 *Patel Engineering Company v. I. O. Corporation*, AIR 1975 Pat 212.

5 *B. Biswas v. Sakhina Begum*, AIR 1973 Cal. 135.

6 *Alopi Parshad v. Union of India*, AIR 1960 SC 588, 595; Halsbury, 4th ed., vol 9, para 692.

work the principle of *quantum meruit* applies'. Where a surveyor agreed to supervise specified building work for a fee of Rs. 30, but additional work was ordered by the owner and supervised by the surveyor, who made no request for increasing fee until after the completion of the work, held he was not entitled to additional fee by way of *quantum meruit* in the absence of a fresh contract, express or implied⁷.

The obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods. It is one of the cases referred to in books on contracts as obligations arising *quasi ex contractu*, of which a well-known instance is a claim based on money had and received⁸. A person without an enforceable contract in his favour supplying goods to a Government department is entitled to a money equivalent to the goods delivered assessed at the market rate prevailing on the day on which the supplies were made⁹. A person supplying goods to a Municipality under a contract which is void under the law governing the Municipality can maintain his claim for compensation under sec. 70, though he is not entitled to maintain a suit for the price of the goods relying upon any contractual obligations of the Municipality¹⁰. Where services are rendered by the sons of a partner to the firm, the sons are entitled to reasonable remuneration on the basis of *quantum meruit*¹¹.

The fact that without the fault of either party, there had been an unexpected turn of events, which rendered the contract more onerous than had been contemplated, is not a ground for relieving the contractors of the obligation which they had undertaken and allowing them to recover on the basis of a *quantum meruit*¹².

3. **Lawfully.**—The word 'lawfully' in the section cannot be ignored¹⁴. The word means not unlawfully. To interpret it as meaning *bona fide*, as has been done in *Venkata v. Arunachalam*¹⁵ would be to put too narrow

7 *Gujarat Electric Board v. S. A. Jain & Co.*, AIR 1972 Guj. 192.

8 *Gilbert v. Knight*, (1968) 2 All ER 248.

9 *Craven-Ellis v. Canons*, (1936) 2 KB 403, 412 CA. See also *Societe F. T. D'Armement v. Sidermar*, (1960) 3 WLR 701, a Suez Canal case.

10 *Secy. of State v. G. T. Sarin*, AIR 1930 Lah. 364, approved by the Supreme Court in *Dhunj Shaw v. Poona Municipality*, AIR 1970 SC 1201; *Kotah Match Factory v. State*, AIR 1970 Raj 118, 124-25.

11 *Dunji Shaw v. Poona Municipality*, AIR 1970 SC 1201, 1204.

12 *Shelat Brothers v. Nanalal Harilal*, AIR 1937 Mad 78, 81.

13 *Davis Contractors Ltd. v. Fareham U.D.C.*, (1956) 3 WLR 37, HL., where the House applied *British Movietonews Ltd. v. London & District Cinemas Ltd.*, (1952) AC 166 and *F. A. Tamplin Steamship v. Anglo-Mexican Petroleum Products*, (1916) 2 AC 397. See also *Societe F. T. D'Armement v. Sidermar*, (1960) 3 WLR 701, a Suez Canal case, which was overruled by "*The Eugenia*", (1964) 2 WLR 114 CA., a subsequent Suez Canal case; *Puran Lal v. State of U.P.*, AIR 1971 SC 712; *State of Rajasthan v. Motiram*, AIR 1973 Raj 223, 232.

14 *Banwari v. Rajkishore* 1946 N 21.

15 51 IC 857; *Saptharishi v. Secretary of State*, 28 MLJ 384; *Venkata v. Arunachalam*, 51 IC 857.

a meaning on the term¹⁶. The section does not empower the court to hold that no act shall be deemed to be lawful unless compensation is due for doing it¹⁷. The term 'lawful' has a wider meaning than the term 'legal'. 'Legal' is what is in conformity with the letter or rules of the law as administered in the courts. 'Lawful' is what is in conformity (or frequently not opposed) to the principle or spirit of the law, whether moral or judicial. The test to be applied is¹⁸, whether the person so acting held such a position to the other as directly to create, or by implication reasonably to justify, the inference that by the act done for the other person he was entitled to look for compensation for it to the person for whom it was done¹⁹. A contract may be illegal, but anything done under the contract is not necessarily unlawful. In *State of West Bengal v. B. K. Mondal*²⁰, a contract to put up certain godowns for the use of the Civil Supplies Department was held unenforceable. The godowns were accepted and used by the department. It was held that merely because the contract was illegal it did not follow that the contractor had done something which was not lawful.

The word "lawfully" in sec. 70 qualifying the doing or delivery of anything must have reference to the doing or delivery of those things which are stated to be lawful in sec. 23. Thus where paddy is delivered in contravention of the Maximum Price Control Order, the acceptance of that delivery would not create a lawful relationship between the parties so as to attract the provisions of sec. 70¹.

4. Benefit.—The section does not mean that the benefit should be thrust upon him without his having the option of refusing it. Nobody has a right to force a benefit on another². The section contains a provision for binding a person to make compensation under conditions which do not postulate a contract. The very purpose of the section is to lay down in what circumstances such a relation may be taken to exist³. Where certain proceedings were taken by the defendant for his own benefit and without any authority, express or implied, from the plaintiff, the fact that the result was also a benefit to the plaintiff did not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiff⁴. The section applies where both parties have benefited by the act of one of them, e.g., if a common channel be repaired by the plaintiffs after informing the defendant who is benefited by the repairs, the defendant is bound to contribute towards the repairs⁵. A co-sharer is not liable to contribute to

16 *Muthayya v. Naryanan*, 109 IC 101.

17 *Pallonjee v. Lonavala Municipality*, 39 Bom LR 835.

18 As laid down in *Chedi Lal v. Bhagwan Das*, 11 A 234.

19 *Punjabhai v. Bhagwandas*, 53 B 309; see *Ganapathi v. Sanna*, 126 IC 733.

20 AIR 1962 SC 779.

1 *R. Manikyam v. M. Satyanaryana*, AIR 1972 AP 367.

2 *Yogambal v. Naina*, 33 M 15; *Ram v. Ram*, 158 IC 25, 28; see *post*.

3 *Pallonjee v. Lonavala Municipality*, 39 Bom LR 835.

4 *Abdul v. Shaluka*, 21 C 496, 504 PC.

5 *Maenakshisundara v. Veerappa*, 92 IC 838; *Ganga Saran v. Narayan Das*, AIR 1971 All 43.

the expenses of a litigation *bona fide* carried on in respect of the common property⁶. It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. Thus, where the expenditure on repairs, or any part of it, is not incurred by a co-sharer for the defendant, the plaintiff is not entitled to claim compensation under the section⁷. Where a tenant effects repairs amounting to renovation of a building without the previous permission of the Rent Controller required under the relevant Rent Control Act and also disregarding the objection of the landlord, the tenant cannot invoke sec. 70 of the Contract Act.⁸ A mortgagee of a share of an estate, who was also a part proprietor, deposited the revenue and cesses payable by the defaulting mortgagor to save the property from being sold, *held*, the mortgagee was entitled to have the amount paid on account of revenue added to his claim and to a personal decree under this section for the amount paid on account of cesses⁹. Similarly, where work is done by a person under a contract which has not been validly executed, but the person on whose behalf this contract has been executed has taken the benefit of the work done by the other party, such person is bound to pay compensation to the other party¹⁰. Where a holder of an *inam* takes for his benefit Government water and the zamindar has to pay cess therefor, the former is bound to compensate the latter, as he has enjoyed the benefit of the water, the zamindar not intending to act gratuitously¹¹. When a person does any act for his own benefit which incidentally benefits another person, the other person is not required to pay for the benefit he derives from the act. What is done cannot be described as done by one person for another, unless it can be shown that but for the existence of that other's interest, it would not have been done¹². Where ryots cleared silt and sued to recover the amount from the Government *held*, the Government did not enjoy the benefit of the act¹³. On a rent decree being passed against two lessees if one pays the entire amount the other is liable to contribute¹⁴. If the fact of a co-owner defending a suit benefit other co-owners incidentally, without any special effort on his part, he is not entitled to claim contribution from them¹⁵. Where the defendant obtained a priority certificate for the supply of coal, the engineer being shown to be the consignee in the railway receipt, and the railway company recovered the freight from the Secretary of State, he was entitled to recover the money from the defendant, as he had the benefit of a payment which was not intended to be made gratuitously by the Secretary of State¹⁶. Where the plaintiff as a trustee

6 *Halima v. Roshan*, 30 M 526.

7 *Jyani v. Umras*, 32 B 612, 618.

8 *Doraipandi v. Sundara Pathar*, AIR 1970 Mad 291, 298.

9 *Upendra v. Tara*, 30 C 794.

10 *Khanna v. Secretary of State*, 167 IC 510.

11 *Rajah of Venkatagiri v. Vudutha*, 30 M 277.

12 *Viswanadha v. Orr*, 45 IC 786.

13 *Radha v. S. of S.*, 1936 M 930.

14 *Bepat v. Sham*, 132 IC 107.

15 *Ghulam v. Inayat*, 141 IC 68.

16 *Secretary of State v. Sobha*, 127 IC 146.

borrowed money for the benefit of a trust estate, he would be clearly entitled to indemnify himself from the trust estate in respect of the payment made by him to the creditor¹⁷. Where the landlord paid the rate for Government water used by a tenant, the former was not entitled to recover it from the latter as the latter did not benefit by such payment¹⁸. The purchaser of a tenure buys the property with the encumbrance of rent due from the original tenant, the liability to pay rent is his, therefore, he is not entitled to recover the prior rent charges paid by him¹⁹. Where two persons were liable to pay the amount due under a mortgage in equal shares, while on the sale of the property one of them paid the entire amount, he was entitled to recover half the decretal amount with interest, but not the statutory compensation money paid by him²⁰. Where in execution of the decree obtained by the first mortgagee, the second mortgagee avoids the court sale by paying the decretal dues the second mortgagee is entitled to be compensated by the purchaser of the equity of redemption under sec. 70, because the payment made by him to avoid the court sale goes to discharge the first mortgage to the benefit of the purchaser of the equity of redemption¹.

5. Does.—It has been contended that the word “does” in this section does not include payment of money, for if it did sec. 69 would be wholly unnecessary. But this would not be so, because there might be cases in which a person who was bound to pay a certain sum of money would not be necessarily benefited by its payment by another. Such a case would not fall under sec. 70 but under sec. 69².

6. For another.—In *Yogambal v. Naina*³, it has been laid down that the section will not apply to cases where the person who makes the payment makes it for himself and not for the other person against whom his claim for reimbursement is made. It has also no application if the payment has been made in the course of a transaction which in one event would have turned out highly profitable to the person making the payment and extremely detrimental to the person whose debt the money went to pay, the payment in such a case cannot be said to have been made for the benefit of another⁴. Where the plaintiff is in wrongful possession of the defendant's property and pays in revenue for his own benefit and on his own account, the fact that he has been a loser by the wrongful act, or that the defendant has been benefited by the payment, will give him no right of suit against the defendant⁵. Where it was from the plaintiffs themselves that the payment of the income-tax was demanded and enforced, it cannot be said to have

17 *Seetharama v. Marugayya*, 12 IC 335; *Peary v. Narendra*, 37 C 229.

18 *Dist. Board, Tanjore v. Muna*, 22 IC 34.

19 *Ranglal v. Kali*, 77 IC 73; but see *Suchand v. Balaram*, 38 C 1.

20 *Bhagwati v. Maiyan*, 134 IC 139.

1 *Khander Khan v. Doraiswami*, AIR 1974 Mad 371.

2 *Smith v. Dinonath*, 12 C 213, 217.

3 33 M 15; *Veeraraghava v. Lakshmana*, 25 MLJ 312.

4 *Ram v. Biseswar*, 2 IA 131.

5 *Binda v. Bhonda*, 7 A 660, *Tiluck v. Soudamini*, 4 C 366.

been paid by them for the defendant merely because the authorities should have exacted payment from the defendant⁶. Where payment was made not only without the consent but without the knowledge of the defendant and the object of the payment was to benefit the plaintiff himself, it could not be recovered⁷. No doubt, tenants are interested in the preservation of their landlord's title from attack, but it does not follow that the former are bound to contribute to any expenses to which the latter may have been put in defending or perfecting their title⁸. It is not necessary in order that the section may apply that the person lawfully doing the thing for another must know who the other person is⁹.

7. Person.—There is no reason why the section should not be applied to payments made or acts done for a minor¹⁰. On the other hand, it has been pointed out that if the words "any other person" could be interpreted as comprising the case of a minor, S. 68 would be wholly unnecessary. Accordingly, it has been held that the section does not apply to the case of a minor¹¹. Where a Hindu mother alienated some property of her (adopted) minor son while a certificated guardian was acting, the alienation was set aside, but the transferee was not paid back the purchase money, for it was applied not in the repayment of debts of the minor but of debts binding on his mother. The payment under the circumstances was held to have been a purely voluntary payment¹². Where the transferee from a limited owner paid up the dues of the superior landlord, on the death of the transferor he was held entitled to recover the sum paid from the next immediate reversioner, as it relieved the latter from the liability to pay to the landlord and the payment was made for the reversioner and apparently not gratuitously¹³. The word 'person' includes a caste. Where the plaintiff does or pays something for his caste and does not intend to do it gratuitously, and the other members of the caste have enjoyed the benefit of his deed, the plaintiff is entitled to compensation¹⁴.

71. Responsibility of finder of goods.—A person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailee.

Responsibility of finder.—The general right of a finder of any article which has been lost, as against all the world except the true owner, was established in the case of *Armory v. Delamirie*¹⁵. A person entering a shop found on the floor a bundle of bank notes. The party who had lost them

⁶ *Ragahavan v. Alamelu*, 31 M 35.

⁷ *Tangya v. Fala v. Trimbak*, 40 B 646, 651; *Chittemma v. Gavaramma*, 16 MLJ 136.

⁸ *Jesingbhai v. Hataji*, 4 B 79.

⁹ *Bhupendra v. Pyari*, 40 IC 464.

¹⁰ *Muthayya v. Narayanan*, 109 IC 101.

¹¹ *Shahbaz v. Bhangi*, 135 IC 177.

¹² *Nathu v. Balwantrao*, 27 B 290; see *Venkata v. Timmayya*, 22 M 314.

¹³ *Bama Sundari v. Adhar*, 22 C 28.

¹⁴ *Bhicoobai v. Hariba*, 42 B 556.

¹⁵ 1 Sm LC see *Bridges v. Hawkesworth*, 21 LJQB 75 : (1843-60) All ER Rep 122.

could not be found, *held*, as against everyone but the true owner, the property in the notes belonged to the finder, not to the owner of the shop, notwithstanding that the former handed it over to the latter with a view to its being restored to the real owner. But the above decision was distinguished in *South Staffordshire Water Co. v. Sharman*¹⁶, where it was held that where a person was in possession of a house or land with a manifest intention to exercise control over it and the things which may be upon or in it then, if something be found in that house or land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the house or land. The finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. It is no conversion if he removes them to a place of security¹⁷.

The plaintiff booked to himself as consignee goods per passenger train from Quetta in Pakistan to New Delhi in India. The receiving railway (Pakistan Rly.) ended at the Pakistan frontier. The goods were taken over by the forwarding railway (Indian Rly.) and came safely up to New Delhi. There was no treaty or understanding between the two railways or their States in the matter of liabilities of the respective railways in the case of through booked traffic. The plaintiff made a claim against the forwarding railway for compensation for non-delivery of goods entrusted to the said railway and as the demand was not complied with, he instituted a suit against the Dominion of India.

On these facts and also on the basis of the course of conduct of the parties, the Supreme Court felt no difficulty in implying a contract of bailment between the plaintiff and the forwarding railway and stated that section 71 of the Contract Act permitted the recognition of a contract of bailment implied by law under circumstances which were of lesser significance than those present in this case¹⁸.

72. Liability of person to whom money is paid, or thing delivered by mistake or under coercion.—A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

Illustrations

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

1. The section.—“Claims for money paid by mistake might also be laid under S. 65, for when a contract is discovered to be void a mistake is involved.

¹⁶ (1896) 2 QB 44.

¹⁷ *Hollins v. Fowler*, LR 7 HL 757, 766, 796 : (1874-80) All ER Rep 118.

¹⁸ *Union of India v. Amar Singh*, AIR 1960 SC 233, 234.

Money paid under a mistake of fact to a banker and held by him as agent of a third person may be recovered from the banker, although he was when receiving the money ignorant of the true state of facts"¹⁹. The section is to be read as subject to the law of estoppel²⁰. The equitable principle embodied in the section is that a person to whom money has been paid by mistake or under coercion must repay or return it. The section implies that the money was not really due to the person to whom it was paid and this is made clear by the illustrations¹. There must be some liability to pay². As the Privy Council has observed, payment by mistake must refer to a payment which is not legally due and which could not have been enforced. The provisions of the section are not inconsistent with those of S. 21. Particular circumstances may disentitle a person from recovering money paid under mistake³. Where property bought by a person in his own name is sold in execution of a money decree against him, the minor having brought a suit to assert his rights, no relief can be obtained against the minor or his property, the purchaser is only entitled to a decree for compensation against the person⁴. The rule laid down in this section has been thus explicitly stated in an English case. Payment made under a mistake of fact may be recovered, provided the payment is made in the belief that a fact is true which is untrue. But if a person with knowledge of the fact pays money, which he is not in law bound to pay and in circumstances implying that he is paying it voluntarily to avoid litigation and close the transaction, he cannot recover it. Such a payment is in law like a gift and the transaction cannot be reopened. On the other hand, if a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods, he can recover it as money had and received⁵. Where there is a partial failure of consideration an action for money had and received does not lie⁶.

2. Mistake'.—The word 'mistake' relates not only to a mistake of fact but also to a mistake of law. Before the decision of the Privy Council in *Sibaprosad's case*⁸, there were conflicting views of the Judges in India as to whether money paid under a mistake of law was recoverable; but in that case the Privy Council held that money paid under a mistake of law is as much recoverable as money paid under a mistake of fact.

If a party makes a payment on the supposition that a fact is true which afterwards proves to be untrue, so that there is no liability to pay, he may

19 C & S 281, refing to *Kerrison v. Glyn Mills*, 81 LJKB 465.

20 *Soloman v. National Bank*, 42 B 16.

1 *Mahadeo v. Digbijai*, 43 A 272.

2 *Adaikappa v. Thos Cook & Son*, 1933 PC 78.

3 *Shiva v. Srish*, 1943 PC 327.

4 *Kuralla v. Akunuri*, 1946 M 150.

5 *Maskell v. Horner*, (1915) 3 KB 106, 118; *Sree Meenakshi Mills v. Callianjee*, 1935 M 799.

6 *Secretary of State v. Taty*, 1932 B 386.

7 *Halsbury's Laws*, 4th ed. vol. 9 para 665.

8 AIR 1949 PC 297.

recover back the money that has been so paid⁹. Where excess price is paid by the buyer on account of the weight of the goods sold being wrongly calculated by the buyer, he is entitled to a refund of the excess price because no person can unjustly enrich himself due to a mistake whether wanton or otherwise, made by him in the course of dealings by him with another¹⁰. Where money has been paid to a person under a mistake of fact common to both parties the money so paid cannot be recovered as money had and received by the defendant for the plaintiff's use¹¹. Money paid with full means of knowledge, but under a forgetfulness of facts at the time of payment which implies absence of knowledge, may be recovered back¹², although the person paying it did not avail himself of the means of knowledge which he possessed¹³. Forgetfulness may be a mistake. A man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist¹⁴. Thus, in *Brownlie v. Campbell*¹⁵ it has been held that in an action to recover money paid, by mistake it is sufficient to prove that at the time of payment the person paying was actually ignorant that the money was due, although he had the means of knowledge and it was owing to his own carelessness that he was, in fact, ignorant. When a vendor left some money with a purchaser for payment to a prior mortgagee and a portion of it was paid, on the sale being set aside the purchaser could not recover from the mortgagee the amount paid to him, there being no privity between the parties and no mistake of fact. The money could be recovered from the vendor only¹⁶. When money is paid to a broker for the purchase of a particular property, but the broker enters into a contract for the purchase of a different property, the plaintiff is entitled to recover the money from the vendor¹⁷. An auction purchaser of property in which the judgment-debtor has no interest, on being deprived of the property by the rightful owner, can sue for recovery of the purchase money¹⁸. In *Freeman v. Jeffries*¹⁹, it was held that an action for money paid by mistake was not maintainable without previous demand. But this case has been distinguished as having no reference to a case in which money was paid and received under a mistake of fact common to both parties, in such a case notice of the mistake and demand for repayment need not be given before action²⁰.

9 See *Colonial Bank v. Exchange Bank*, 11 AC 84; *Barclay & Co. v. Malcolm*, 133 LT 512.

10 *Nanak Chand v. T. T. Electric Supply*, AIR 1975 Mad 103.

11 *Barrett v. African Products*, 110 IC 299.

12 *Kelly v. Solary*, 11 LJ Ex 10 : (1835-42) All ER 320, relied on in *Norwich U.F. Insce. v. Price*, 1934 AC 455 : (1934) All ER Rep 352; *A.S.B.S. Corp. v. S.V.D. Council*, (1937) 2 KB 607.

13 *Imperial Bank v. Bank of Hamilton*, 1903 AC 49, 56, cited in *Jones v. Waring & Gillow*, 1926 AC 70; (1926) All ER Rep. 36.

14 *Hood v. Mackinnon*, (1909) 1 Ch 476.

15 5 AC 925.

16 *Chatter v. Punjab Bank*, 145 IC 349.

17 *Narumal v. Yusifally*, 78 IC 794.

18 *Mehar v. Milki*, 1932 L 401; but see *Shanti v. B. C. Society*, 1950 B 313.

19 LR 4 Ex 189.

20 *Baker v. Courage*, (1910) 1 KB 56 : (1908-10) All ER Rep 65.

The term "mistake" used in S. 72, Contract Act comprises within its scope a mistake of law as well as a mistake of fact. There is no conflict between the provisions of S. 72 on the one hand and Ss. 21 and 22 of the Contract Act on the other. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same. Where it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. In a Calcutta case the defendant paid sales tax under the mistaken belief that sales tax was payable in respect of building contracts. The defendant recovered a part of the tax paid by him from the plaintiff as it was agreed that if sales tax was payable it was to be paid by the plaintiff. Both the parties were under a common mistake that sales tax was payable in respect of building contracts. *Held* that the plaintiff was entitled to recover the amount paid by him to the defendant as money paid under a mistake of law¹. The assessee will be entitled to recover back the monies paid by him to the State under mistake of law². Payment of tax under a law later on declared by the Supreme Court as *ultra vires* is not payment under a mistake of law³.

Section 72 has no application to a case where money is paid by a person to a bank with instructions that it should be deposited in the account of a third person who is a constituent of the bank. As soon as the money is credited into the account of the constituent, even though the person paying it may have paid it by mistake, it becomes the money of the constituent, and the bank cannot pay it back to the person who paid it to the account of the constituent on his representation that it was paid by mistake, without obtaining the consent of the constituent⁴.

When a man has voluntarily paid money he cannot recover it back if at the time of payment he knew all the facts⁵, even though the claim was not legally enforceable being based on an illegal consideration⁶. Where the plaintiff bought his own land by mistake equity relieved against the mistake by compelling the defendant to make over the consideration money as he had no right to it⁷. Where, however, money is paid not under a mistake but under a bargain, and it turns out to be a bad bargain, that will not affect its validity⁸. The plaintiff is entitled to recover from the defendant money belonging to him when it is wrongly obtained by the defendant from

1 *Calcutta Corporation v. Hindustan Construction Co. Ltd.*, AIR 1972 Cal 420.

2 *Sales Tax Officer v. Kanhaiya Lal*, AIR 1959 SC 135. See also *State of M.P. v. Bhailal*, AIR 1964 SC 1006.

3 *Tilokchand v. H. B. Munshi*, AIR 1970 SC 898.

4 *Jammu & Kashmir Bank v. Attar-ul-Nisa*, AIR 1967 SC 540.

5 *Howes v. Bishop*, (1909) 2 KB 390.

6 *Wilson v. Ray*, 8 LJ QB 224.

7 *Bingham v. Bingham*, 1 Ves sen 126.

8 *Harris v. Lloyd*, 5 M&W 432.

a person who is not held out by the plaintiff as his agent⁹. The general rule is that money paid under a mistake of fact may be recovered back, though the party paying had at the time the means of knowledge or had once such knowledge, but had forgotten the fact at the time of payment, provided he did not intend to waive enquiry into the facts¹⁰. A banker who pays a customer's cheque in ignorance of the state of accounts cannot recover from the customer¹¹. A voluntary payment cannot be recovered back from the party receiving it. An overpayment of interest, made by the mortgagor's agent to the mortgagee, cannot be recovered under this section, the money not having been paid under protest or compulsion¹². Where the plaintiff in London ordered from the defendant at Singapore 175 tons of gum, but on arrival of the goods they were found to be deficient in weight, due partly to evaporation and partly to the fact that the baskets and leaves had been weighed along with the gum, the plaintiffs were held entitled to recover the excess above the price of the net weight of the gum¹³. A debtor who makes an overpayment to a creditor by mistake is entitled to recover the amount under this section. Mistake under the section means a payment under a mistaken belief that the money is due when it is not legally due¹⁴. Where an agent has received money for his principal and has afterwards been informed by the payer that he has paid by mistake, the law governing the liability of the agent to refund to the person who has paid him by mistake depends on the fact, whether he (1) has actually paid the money to his principal, or (2) has done any act which will prejudice his relation to his principal¹⁵. The general doctrine underlying the liability to refund in such a case is this : Where money is paid or goods delivered to a man by mistake, it can be recovered so long as the *status quo* is maintained, i.e., so long as he can be equitably regarded as having still the benefit of that which was paid or delivered to him. Thus, if by reason of mistake, instead of handing over 7,000 pieces, a person hands over 7,014 pieces to another, and that person hands them over to another, labouring exactly under the same mistake as the person who delivered them to him, it will be inequitable to compel that person to restore the goods or to pay for them to the person who delivered them. The section has to be qualified by the doctrine of equity in order to render it intelligible¹⁶.

9 *Karala Valley Tea Co. v. Lachmi*, 68 CLJ 94, refing to *Farquharason v. King*, 1902 A 35.

10 *Townsend v. Crowdy*, 29 LJCP 300; *Pentakota v. P. Board*, 1940 M 660.

11 *Imperial Bank v. Bank of Hamilton*, 1903 AC 49; *Punjab Agency v. Mercantile Bank*, 127 IC 223; *Chambers v. Miller*, 32 LJ CP 30 : 143 ER 50; *K. M. Firm v. Official Assignee*, 43 MLJ 142.

12 *Manilal v. Chandulal*, 32 Bom LR 424.

13 *Devaux v. Conolly*, 19 LJCP 71 : 137 ER 658.

14 *Badrunnissa v. Muhammad*, 2 A 671; *Shiba v. Srish*, 28 Pat 913.

15 *Solomon v. National Bank*, 42 B 16, disstg. from *Shugam v. Government of N.W.P.*, 1 A 79.

16 *K.M.P. Firm v. Official Assignee, Madras*, 43 MLJ 142; *Kleinwort & Sons v. Dublin Rubber Co.*, 97 LT 263; *Bavins v. L. & S. W. Bank*, (1900) 1 QB 270; *Gangadas v. Haji Ali*, 42 B 54.

The history of an action for money had and received is discussed in *Sinclair v. Brougham*¹⁷. There is no specific provision of the law in India dealing with such an action; the rule of equity and good conscience, which means the law of England, will therefore prevail. Such a cause of action does not come under this section. When an article is sold which turns out to be of less value than the price given for it, if there be no fraud, the extra price cannot be recovered back. But when the thing is not of arbitrary value, but the value depends upon another factor, e.g., upon weight; if the weight turns out to be less than that paid for, the party selling is bound to refund¹⁸. A railway company cannot charge more to one person than to another under the same circumstances; if they do, the amount of excess charged may be recovered as money had and received¹⁹. Where in adding up the total quantity of an article purchased a mistake is made, the buyer will be entitled to recover the sum overpaid to the seller²⁰. So also where a mistake is made in making up an account, the amount omitted to be charged¹, or if there has been an overpayment, the amount in excess of the sum due² may be recovered. The right to recover money paid under a mistake of fact must have reference to a belief in the existence of a fact which, if true, would have given the person receiving a right against the person paying the money. Thus, where a person pays off a prior charge for his own benefit, but does not derive the benefit expected, the payment is not made under such a mistake of fact as to authorise him to get it back³. Where a tenant continues to pay rent at the old rate without applying for the scaling down of the rent under a new provision of law, the amount paid by him in excess of the standard rent under the new provision cannot be said to have been paid by mistake⁴. Where a director became disqualified from acting as such but continued to act and was remunerated as a director, the fees paid to him from the time he became disqualified should be refunded by him⁵. Parties to a fraudulent transaction for the bringing into existence of nominal book entries cannot ask for the recovery of money paid on the ground of mistake of fact⁶. Where under a *bona fide* forgetfulness of fact money is sent to a wrong person, he is not entitled to keep it, but the sender may recover it on the ground of mistake⁷. Where an executrix, in ignorance of her right of retainer, made over the assets in her hands to the trustee in bankruptcy, the latter was ordered to make over to the former the amount she was entitled to retain. Mistakes of this kind although attributable to

17 1914 AC 398, reld. to in *Bhagwati v. Rai*, 161 IC 171; Halsbury, 4th ed., vol. 9, Paras 676-680.

18 *Cox v. Prentice*, 3 M&S 344 : (1814-23) All ER Rep 574.

19 *G. W. Ry. v. Sutton*, LR 4 HL 226.

20 *Newall v. Tomlinson*, LR 6 CP 405.

1 *Dails v. Lloyd*, 17 LJQB 247.

2 *Townsend v. Crowdy*, 29 LJCP 300.

3 *Aiken v. Short*, 25 LJ Ex 321 : (1843-60) All ER Rep 425.

4 *Union of India v. Jal Rustomji*, AIR 1970 SC 1490.

5 *Bodega Co.*, (1904) 1 Ch 276 : (1900-03) All ER Rep 770.

6 *Sivagami v. Subramania*, 168 IC 941.

7 *Ramaswami v. Narayanaswami*, 90 IC 906.

ignorance of law will be set right by the court so long as the officer of the court still has the money in his hands⁸. The reason is that the officer of the court is bound to be even more straightforward and honest than ordinary person in the affairs of everyday life⁹. Mistake is a ground for relief in the cases of sales *inter vivos* as also in cases of sales held through the intervention of the court¹⁰. The person paying under a mistake of fact, however ignorant he may be and however forgetful he may have been, is entitled to recover money unless he has at any time waived his claim or has been estopped by reason of conduct, by which the payee has altered his position by parting with the money¹¹. A decree holder-auction-purchaser cannot claim refund of the purchase money, when subsequent to the sale he discovers that the judgment-debtor at the time of the court sale had no saleable interest in the property. Such claim is not justified by the doctrine of unjust enrichment¹².

3. **Coercion**¹³.—The term 'coercion' in the section is used in its general sense and not in the sense defined in S. 15. If a third party be coerced into paying the money, in satisfaction of a decree against the judgment-debtor and be not himself liable for the money, the money is paid by him under coercion within the meaning of the section and a suit will lie to recover the money¹⁴. Therefore, the views expressed in older decisions¹⁵, where it was indicated that in action brought to recover money the "coercion" to be proved must be such as comes within the provisions of S. 15, are overruled. Where money was deposited in court by a judgment-debtor under protest for the purpose of preventing an injurious sale of the property, in a suit by the depositor to recover the amount it was held that the payment was not voluntary but made under compulsion¹⁶. Where a consumer pays money to an electric company under a mistaken belief that the rules of the company were framed in compliance with legal formalities, he will be entitled to recover¹⁷. Money paid may be recovered if the payment has been under duress of goods¹⁸. The law has been thus laid down in *Pappu v. Official Receiver*¹⁹: there can be no doubt that under the law as declared by the Judicial Committee, a person making a payment to rid himself of unlawful interference with his property can recover back the money. Formerly the view that prevailed in India was that the word 'coercion' in this

8 *Ex. Rhoades*, (1899) 2 QB 347 : (1895-99) All ER Rep 333.

9 *Re Tyler*, (1907) 1 KB 865 : (1904-07) All ER Rep 181.

10 *Uzir Ali v. Nasimannessa*, 116 IC 634.

11 *Lloyd's Bank v. Administrator General*, 12 R 25, see cases reld. to.

12 *Annamma v. Tressiamma*, AIR 1975 Ker 185 (FB).

13 Halsbury, 4th ed., Vol. 9, Paras 660-664.

14 *Ah Choon v. T.S. Firm*, 5 Rang. 653 ; *Suraj v. Suraj*, 147 IC 482 ; *Adhar v. Rameswar*, 65 IC 517 ; see *Seth Kanhaya v. National Bank*, 50 IA 56,

15 *Jugdeo v. Raja Singh*, 15 C 656 ; *Narayanasami v. Osuru*, 25 M 548.

16 *Fatima v. Mahomed*, 10 WR PC 29 ; *Dulichand v. Ramkishan*, 7 C 648, 653 ; see *Forbes v. Secretary of State*, 42 C 151, payment of income-tax under protest is payment under compulsion ; *Pappu v. Pichu*, 1935 M 961.

17 *Kakaram v. Khattar E.E.Co.*, 1939 Pesh 9.

18 *Ashomole v. Wainwright*, 11 LJQB 79 ; *Bansraj v. S. of S.*, 1939 A 373.

19 (1836) 1 MLJ 829.

connection meant the same thing as coercion as defined in S. 15. That view is wrong²⁰. The owner's right, therefore, to recover back the money paid under compulsion does not rest merely on justice and equity founded upon the English analogy, but is a statutory right expressed in terms of an Indian Act. A person, who fraudulently obtains payment in execution of a decree which has been satisfied, is really obtaining payment under coercion within the meaning of the section. Money obtained under an agreement to stifle a pending non-compoundable criminal prosecution may be recovered back, as the money may be regarded as paid under coercion¹. But no refund of money given under an agreement not to prosecute a criminal case will be allowed unless the circumstances disclose pressure or undue influence². Where there arises a statutory right in favour of a person under this section, his claim cannot be rejected on the ground that on consideration of the whole circumstances of the case, it is not equitable that the money should be paid back³. Payment of a tax under threat of duress is not a voluntary payment⁴. The mere fact of payment under protest may not entitle a person to recover the sum paid⁵. A mistake as to the legality of rules framed by an electric company is not a mistake of law. Amount paid under threat of supply of electricity being cut off can be recovered⁶. Where property of father and son is attached in order to realise fine from the son, father on paying the sum is entitled to recover it⁷. But if a payment by a stranger is voluntary the money paid is irrecoverable⁸.

A defendant who has by mistake and without legal liability paid a sum of money under pressure of legal process cannot, as a general rule, recover it back from the plaintiff⁹, so neither in general can a plaintiff who has given the defendant in an action credit for a sum on account. But there must be *bona fides* on the part of the party who has got the benefit of his opponent's payment. If there has been an allowance in account to the defendant under a mistake of fact known to the defendant, and of which he unfairly takes advantage, the plaintiff is entitled to recover the amount from the defendant as money had and received by him to the plaintiff's use¹⁰. So also when a fraudulent use has been made of a legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process may recover it¹¹. So far as the return of the deposit is concerned, the moment the agreement is broken there is either a failure of consideration

20 *Kanhaya Lal v. National Bank*, 40 IA 56; *P. B. Mills Co. v. Union of India*, AIR 1970 Guj 59, 63-64.

1 *Muthuveerappa v. Ramaswami*, 40 M 285, see S 23 note.

2 *Amjadennessa v. Rahim*, 42 C 286.

3 *Seth Kanhaya Lal v. National Bank*, 40 IA 56.

4 *Lutchmee v. Secretary of State*, 19 MLJ 470; see *Pownall v. Ferrand*, 6 B & C 445 : 108 ER 513; *Secretary v. N.E.I. Press*, 1949 N 215; *Vasant v. Behari*, 1938 N 225.

5 *Maskell v. Horner*, (1915) 3 KB 120 : (1914-15) All ER Rep 595.

6 *Kaka v. Khattar E. S. Co.*, 1939 Pesh 8.

7 *Bansraj v. S. of S.*, 1939 A 373.

8 *Bajrang v. Sitaram*, 1949 C 457.

9 See *Marriot v. Hampton*, 2 Sm LC : (1775-1802) All ER Rep 631; *Moore v. Vestry of Fulham*, (1895) 1 QB 399; *S. of S. v. Tatty*, 1932 B 386.

10 *Ward v. Wallis*, (1900) 1 QB 675, *referred to in Hari v. Hara*, 20 CWN 188.

11 *Cadaval v. Collins*, 4 A & E 858, 867.

or there is an equity in favour of the plaintiff which impliedly makes the retention of the sum a debt due by the defendant to the plaintiff. Money paid under a decree or judgment cannot be recovered back in a fresh suit whilst the decree or judgment remains in force. This rule of law rests upon the ground that the original decree or judgment must be taken to be subsisting or valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded the money recovered under it ought certainly to be refunded. Money paid into court to prevent the sale of the plaintiff's property in execution of a decree against a former owner of the property is not a voluntary payment and the plaintiff is entitled to recover the amount from the decree-holder. But it has been held that under O. 21, r. 89, C. P. C. the decretal amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and therefore no suit will lie for its recovery after a person has secured the benefit of having the sale set aside¹⁴. If a person who has no title to it obtains money belonging to another he is bound to refund it with interest¹⁵. A purchaser before attachment is entitled to recover the purchase money paid by him to have the execution sale set aside¹⁶. Where the main decree which is the basis of subsequent decree is reversed, the latter being subordinate and dependent decrees are deemed to be superseded¹⁷. Where, however, the decree is not reversed or superseded by any competent court money paid under it cannot be recovered by a fresh suit¹⁸. Where accounts are drawn up and assented to by the parties under a common mistake as to their rights and obligations, the accounts may be directed to be reopened. The law implies an obligation to repay the money which is an unjust enrichment. Thus where in a suit for recovery of money due on the basis of an acknowledgment it is found on evidence that the amount specified by way of interest in the acknowledgment is wrong the court can correctly recalculate the interest due¹⁹.

4. **Limitation.**—"There is no Article in the schedule to the Limitation Act expressly providing for the action for money paid by mistake. Art 62 refers to an action for money received for the plaintiff's use, fixing the date of receipt as the starting point. Art 96 relating to suits for relief on the ground of the mistake gives as the starting point the date when the mistake becomes known to the plaintiff"²⁰. The duty of repayment of money received under a mistake does not arise until notice of the mistake has been given and demand made for repayment¹.

12 *Champaklal v. Nectar Tea Co.*, 57 B 306; but see *Kamal v. Peary*, 53 IC 553.

13 *Shama Purshad v. Harro Purshad*, 10 MIA 203.

14 *Shanker v. Vadhilal*, 57 B 601, *refing to Narayan v. Amgauda*, 54 B 1094; *Raghu v. Deokali*, 7 Pat 30; *Kummakutty v. Neelakandan*, 53 M 943.

15 *Alagappa v. Muthu*, 42 IC 836.

16 *Kotla v. Thamman*, 135 IC 24.

17 *Jogesh v. Kali*, 3 C 30, 37, FB.

18 *Kishen Sahai v. Bakhtawar*, 20 A 237.

19 *Thomas v. National Tyre*, AIR 1974 SC 602.

20 C & S 282.

1 *Fraeman v. Jefferies*, LR 4 Ex 189 *explnd*, in *Baker v. Courage*, (1910) 1 KB 56; (1908-10) All ER Rep 65.

CHAPTER VI

OF THE CONSEQUENCES OF BREACH OF CONTRACT

73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there take on board on the first of January a cargo which A is to provide, and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freight rises, and on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of re-building the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a shipowner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit one-half of his passage money. The ship does not sail on the first of January, and B, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

1. The section.—The section is but declaratory of the right to damages arising out of a breach of contract or an obligation resembling that created by contract. Breach of contract has to be proved before any inquiry can be conducted into the quantum of damages, so where it is impossible to say who has committed the breach no question of damages can arise². Two considerations arise in assessing damages: whether the damage naturally arose in the usual course of things from the breach; and whether the plaintiff had the means of remedying the inconvenience and has neglected to avail himself of it³. It cannot be said that damages are granted because it is part of the contract that they shall be paid; it is the law which imposes or implies the term that upon breach of a contract damages must be paid. A person contemplates the performance and not the breach of his contract; he does not enter into a kind of second contract to pay damages, but he is liable to make good those injuries which he is aware that his default may occasion to the other

² *Jamal v. Moolla Dawood*, 43 IA 6, 11; *Pulavarty v. Bangaru*, (1950) 2 MLJ 505.

³ *Amanchi v. Nama*, 37 MLJ 335.

contracting party⁴, for no one by his own default can be allowed to defeat his own contract⁵. A party to a contract cannot be in a better position by reason of his own default than if he had fulfilled his obligations. Damages are recoverable for breach of an implied term of an agreement⁶. It is the plaintiff's duty to take all reasonable steps to mitigate his damages. The amount lost by delay in selling must, therefore, be deducted from the damages recoverable⁷. On breach of contract, the remedies of specific performance, injunction, and, recovery of damages are obtainable. The plaintiff must confine his attention to one⁸. It is sometimes necessary to determine whether the cause of action in a suit for recovery of damages is based on a breach of contract or on tort⁹. The section gives a right of resale which must be exercised within a reasonable time unless discretion regarding time is given to the seller¹⁰. When a breach of contract has taken place the cause of action may be discharged by accord and satisfaction¹¹. When damages are assessed, the court is not ascertaining a pecuniary liability which already existed. The court in the first instance must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant. A claim for damages for a breach of contract is, therefore, not a claim for a sum presently due¹².

This section prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect the right of the sellers to bring an action for the recovery of the price of the goods on the buyers refusing to take delivery¹³. Where a toll-contractor suffered loss of revenue owing to the outbreak of plague and the regulations made by the Government in consequence thereof, an action did not lie against the Government for damages, for it was not a case of a breach of contract¹⁴. Where by a breach of agreement a person not a party to the agreement is injured, he cannot have a cause of action against the party who caused the breach¹⁵. Illustration (r) does not deal with a case of sale of goods. If a plaintiff elect only to sue for the return of his deposit, giving up his claim to damages based on the difference between the contract and the market rate, he cannot recover interest on his advance¹⁶. If either party to a contract break it, the party who suffers by such breach is entitled under the section to receive from the party who has broken the contract compensation for any loss caused to

⁴ *Hydraulic Engineering Co. v. Mc. Haffie*, 4 QBD 670.

⁵ *Mallins v. Freeman*, 7 LJ CP 212, *referred to in Re Alfred*, 155 IC 444.

⁶ *Younie v. Tulsi*, 1942 C 382; *Southern Foundries v. Shirlau*, 1940 AC 701.

⁷ *Mangal v. Malik*, 34 ALJ 937; *Furness v. Duder*, (1936) 2 KB 461.

⁸ *Fox v. Scard*, 33 Beav. 327; *G. A. Insce v. Noel*, (1902) 1 KB 377; *French v. Macale*, 2 Dr & W 269; (1835-42) All ER Rep 6.

⁹ *Jarvis v. Moy*, (1936) 1 KB 399 (see distinction pointed out).

¹⁰ *Ralli Bros. v. Bhagwan*, 1945 L 35.

¹¹ *N. S. Bank v. Probodh*, 1942 C 87.

¹² *Union of India v. Raman Iron Foundry*, AIR 1974 SC 1265, 1273.

¹³ *Finlay Muir & Co. v. Radhakissen*, 36 C 736, see S. 55, Sale of Goods Act.

¹⁴ *Secretary of State v. Abdul*, 4 Bom LR 874.

¹⁵ *Pappu v. Pichu*, 1935 M 961; but see *Bank of India v. Jamsetji*, 1950 PC 90.

¹⁶ *Kandappa v. Muthurami*, 50 M 94, 107; *Re Beedham*, 1934 L 845.

him thereby¹⁷, even though it might have been stipulated in the contract that the vendor would have the right of resale in the event of breach of contract¹⁸. One breach of a contract can only furnish one cause of action and no more. Consequential damages arising from the breach give no new cause of action. The breach of a contract without actual loss gives a sufficient cause of action¹⁹. In the case of a breach of contract the choice of remedy lies not with the promisor but with the person whose rights are infringed²⁰. A contract may contain conditions for the doing of certain acts on payment of certain sums. The doing of the acts does not occasion a breach of contract but creates a liability for the payment of the sum stipulated in the contract¹. In a suit for breach of contract the defendant is entitled to be supplied with the necessary particulars of his claim by the plaintiff².

A breach of contract may be incapable of remedy, e.g., under S. 114A (b) T. P. Act, if time is of the essence of the contract³. A suit for damages under the section would only lie if there has been a breach of a contract by the defendant. Thus, where the defendant gave the plaintiff permission to open a pawnshop but the licence was set aside by the Commissioner acting under legal powers, the defendant was not liable⁴. The rule laid down in the section applies to the case of a suit for damages arising out of a wrongful attachment⁵. Where a pleader after accepting a retainer with a fee from a client accepts a brief from the other side he is liable in damages to the party that had paid the fee⁶. The first part of the section has been described as a compendious statement of the law of tort in India, namely, if a man does any wrongful act of which the direct result is loss or injury to another, he must make compensation in money if the extent of the loss or injury can be estimated in money⁷. In a suit for damages the amount of damages payable is a question of fact and not of law⁸. When a contract is repudiated, it survives for the purpose of measuring the claims arising out of the breach; the arbitration clause survives for determining the mode of settlement of claims⁹.

Where the appellant company was in breach of a contract to allot a specified number of its shares to the respondent, and an order for the specific performance of the contract was made, the damages to be awarded to the

17 *Kurupamaya v. Seesil*, 49 IC 811.

18 *H.W.B. Co. v. Ferris*, (1935) 1 KB 613 : (1935) All ER Rep 603.

19 *Raghuber v. Jaij Rai*, 9 ALJ 534; *Kumar v. Nobo*, 26 C 241 not fold; *Meyappa v. Nachammal*, 123 IC 343.

20 *Sitla v. Harpal*, 20 IC 783.

1 *Leigh v. Lille*, 30 LJ Ex 25.

2 *Jamshed v. Kunjilal*, 1938 N 530.

3 *Provat v. B. C. Bank*, (1938) 2 Cal 434.

4 *Ah Kwe v. Municipal Committee, Thaton*, 120 IC 135.

5 *Mamu v. Raman*, 8 IC 1206.

6 *Tumuluri v. Madhaburi*, 26 MLJ 72.

7 *Gangadhar v. Bhangi*, 95 IC 35.

8 *Karim v. Rudra*, 132 N 118.

9 *Radhakishan v. G. Construction Co.*, 1947 S 57.

respondent in respect of the breach of contract were restricted to the equivalent of the dividends at the rates declared by the company between the date when the shares should have been allotted and the date of actual allotment, with interest on the dividends until payment¹⁰.

2. **Measure of damages.**—The rule with regard to the measure of damages has thus been laid down in the leading case of *Hadley v. Baxendale*¹¹. Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both the parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstance, from such a breach of contract. The principle really at the bottom of the above decision has been explained to be that a person can only be held responsible for such consequences as may reasonably be supposed to be in the contemplation of the parties at the time of making the contract¹². Expenditure incurred before the formation of the contract is recoverable if it was within the contemplation of the parties that such expenditure was likely to be wasted if the contract was broken¹³. For breach of a contract by a purchaser on failure to take delivery on the due date, the measure of damages would be the difference between the contract rate and the market rate at the date of the breach¹⁴, less the sum, if any, paid in advance for the goods¹⁵, or as earnest money¹⁶. Damages are recoverable where the relation between the parties is one of sale and purchase and not one of employment¹⁷. In some cases the profit made by the defendant by breaking the

10 *Sri Lanka Omnibus Co. Ltd. v. L. A. Perera*, (1952) AC 76 PC.

11 23 LJ Ex 179; 2 Sm LC 529, *Livingstone v. Rawyards Coal Co.*, 5 AC 25, 39 : 42 LT 334.

12 *Grebert-Borgnis v. Nugent*, 15 QBD 85, 92.

13 *Anglia Television Ltd. v. Reed*, (1971) 3 All ER 690 CA.

14 *Narsingirji Mfg. Co. v. Budan*, 26 Bom LR 523; *Shriram v. Trimbak*, 29 Bom LR 1036; *Mehrchand v. Jugal*, 85 IC 317; so also in case of failure to supply goods *Bhan Na v. Cheik*, 36 IC 264; *Ma Hla v. Ma Sein*, 1940 R 146.

15 *Rayulu v. Kuppu*, 49 MLJ 1.

16 *United Brokers v. Alagappa Corp.*, 1948 M 391.

17 *Mangal v. Malik*, 34 ALJ 937.

contract may be taken as the measure of the plaintiff's loss¹⁸. The date of breach of contract is the date of its performance and not that of its repudiation¹⁹.

Again, it has been observed that the quantum of damages is a question of fact, the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. Subject to this observation there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract has been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from breach; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. The second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business, he has taken an action arising out of the transaction, which action has diminished the loss, the effect in actual diminution of the loss he has suffered may be taken into account, even though there was no duty on him to act²⁰. The real issue in cases of damages for breaches of contract is what is the actual injury sustained by the plaintiff by reason of the defendant not having performed his contract. The amount of that injury can only be ascertained by determining what the property would have fetched if put up for sale at the open market¹. In assessing damages every reasonable presumption may be made as to the benefit which the plaintiff might have obtained by the *bona fide* performance of the arrangement². The rule in the Explanation to the section must be applied with discretion. A man who has already put himself in the wrong by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party³.

In order to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked for should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore there must be something immediately flowing out of the breach of the contract complained of, something immediately connected with it, and not merely connected with it through a series

18 *Acharaj v. Sant Singh*, 150 IC 146.

19 *Mackay v. Kameshwar*, 1932 PC 196.

20 *British W. Electric Mfg. Co. v. Underground E. Ry.*, 1912 AC 673 : (1911-13) All ER Rep 63, cited in *Hajee Ismail v. Wilson & Co.*, 41 M 709 ; *Payzu v. Saunders*, (1919) 2 KB 581 : (1918-19) All ER Rep 219 ; *Godihal v. Nandan*, 25 MLJ 3, the same rule applies to torts.

1 *Bai Dahi v. Mathuresh*, 4 Bom. LR 818 ; *Gangaram v. Hariram*, 102 IC 628.

2 *Wilson v. N. & B. J. Ry.*, LR 9 Ch 279 ; *Anglia Television Ltd. v. Reed*, (1971) 3 All ER 690 CA.

3 *Gibbon v. Kundanmal*, 28 IC 196.

of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. A person is to recover in case of breach of contract the damages directly proceeding from the breach and not too remotely. This rule has been described as a vague rule; "it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night or day"⁴. Compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach of contract⁵. Special damage, e.g., extra profits that might have been made by selling the goods at a fair, is not recoverable where the object of the vendor has not been brought to the notice of the carrier⁶. But in *the Heron II*⁷ it was held that loss of profit was recoverable as damages for breach of the contract of carriage by deviations involving delay. Damages can be awarded for breaches of contract already committed, but the court will not declare a general right to indemnity giving a right to damages for prospective or future breaches of contract⁸.

Damages are of three kinds : (i) nominal damages which occur in cases, for instance, where the seller brings an action for the non-acceptance of goods the price of which has risen since the contract was made ; (ii) general damages, which are awarded when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man ; and (iii) special damages, which are given in respect of any consequences reasonably or probably arising from the breach complained of. The test that has been laid down is that they must be such as the court reasonably considers to be those which the parties would certainly contemplate⁹. There is no essential difference between common and special damages further than that the latter must be specially mentioned in order to give notice to the defendant that they are claimed¹⁰.

It is not easy to assess the market price in some cases and the court runs immense risk in ascertaining what is called the market price¹¹, e.g., the market price of goods the subject matter of future deliveries¹². The difficulty of estimating damages with certainty is no ground for refusing to fix them or of giving nominal damages only. The mere fact that the loss arising out of a breach of contract is dependent on the volition of another person does not necessarily render it incapable of assessment¹³. Where a contingency on

4 *Hobbs v. L. & S. W. Ry.*, LR 10 QB 111 : (1874-80) All ER Rep 458, see *Ahmad v. Raihan*, 1934 A 525 ; *Aruna Mills Ltd. v. Dhanrajmal Govindram*, (1968) 1 All ER 113 QBD.

5 *Ram v. Shankar*, 108 IC 433.

6 *Fazal v. E.I. Ry.*, 43 A 623.

7 [1967] 3 All ER 686.

8 *Lloyd v. Dimmack*, 7 Ch D 398.

9 *Prehn v. Royal Bank*, LR 5 Ex 92 ; *Wroth v. Tyler*, (1973) 1 All ER 897, Ch D.

10 *Gibbs v. Cruikshank*, LR 8 CP 454.

11 *Low v. Barchard*, 8 Ves 133.

12 *Fothergill v. Rowland*, LR 17 Eq 132, 140.

13 *Chaplin v. Hicks*, (1911) 2 KB 786 : (1911-13) All ER Rep 224 ; *Maniappa v. Anthoni*, 1950 M 289.

which a contract was to be enforced has occurred and the contract has not been performed, damages have to be ascertained in the usual manner¹⁴. Where the exact valuation of damages is impossible the court will give a lump sum as damages¹⁵. Where the hirer under a hire-purchase agreement repudiates the agreement after paying only two instalments but retains the subject matter of hire, the measure of damage payable by the hirer is the amount remaining due as hire money after deducting the amount already paid¹⁶. In the absence of proof of damages nominal damages are not recoverable.¹⁷ But it has also been held that the plaintiff cannot recover any damages where he fails to produce evidence of the market rate at the place of contract at the time of breach¹⁸. If certainty is impossible of attainment the damages for a breach of contract are not unassessable¹⁹. Every breach of duty arising out of a contract gives right to an action for damages without proof of actual damage. The amount of damages recoverable is, as a general rule, governed by the extent of the actual damage sustained in consequence of the defendant's act. In cases admitting of proof of such damage the amount must be established with reasonable certainty. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. In the extreme case where the defendant has put it out of the plaintiff's power to prove the quantum of damage exactly, the presumption is against the defendant and the burden is upon him to reduce the amount from the highest possible estimate²⁰. The damages must be appreciable, capable of being stated, and of being established. No damages can be recovered for injuries to a person's feelings as in the case of torts¹. In a proper case damages for mental distress can be recovered in an action for breach of contract². Where the defendant had promised to make the plaintiff a partner but broke the promise, the plaintiff was entitled to damages, the measure of which was the difference between the value of the plaintiff's estate immediately after the defendant's breach of promise and the value it would have had if the defendant had performed his promise³. Where in a contract between a railway company and a contractor, the original rates of work were abandoned with the consent of both parties and the contractor did the work and the company accepted it, the amount which the contractor was entitled to recover should be determined on the basis of fair and reasonable rates⁴. For non-performance of a condition subsequent the court will give relief where it can compensate the party in damages⁵.

14 *Kanchad v. Motiram*, 68 IC 720; *Joseph v. Shew Bux*, 17 ALJ 158.

15 *Rameswar v. Shyama*, 99 IC 757.

16 *P. M. Ali v. A.P.R. Marudappan*, AIR 1972 Mad 152.

17 *Jaya v. Leo Filims*, 1948 M 442.

18 *Kanhayalal v. Bishendas*, 149 IC 1119.

19 *Chaplain v. Hicks*, (1911) 2 KB 786; (1911-13) All ER Rep 224.

20 *Kingsley v. Secretary of State*, 36 CLJ 271.

1 *Hamlin v. G.N.Ry.*, 26 LJ Ex 20; 1 H&N 408.

2 *Jarvis v. Swans Tours Ltd.*, (1973) 1 All ER 71 CA.

3 *Tansey v. Rivett*, 31 IC 73.

4 *B.N. Ry. Co. v. Ratanji*, (1938) 2 Cal 72.

5 *Munshi v. Ahmad*, 1933 O 291.

Where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence. Thus, the subsequent death of a partner cannot be taken into account in assessing damages for a breach of contract of partnership⁶. The mode of computing the value of foreign currency "and thus converting the one currency into the other is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this be so, it follows that the date as of which that value must be ascertained is the date of the breach and not the date of the judgment"⁷. But in a suit on a grain bond the court awarded compensation for breach of contract at the rate of grain prevailing at the time of execution of the contract and not at the time of suit when the price had doubled, a fact not foreseen by either party⁸. Where at the date fixed for the completion of the contract the market value of the house was £7,500 but at the date of the judgment it had risen to £11,500, i.e., £5,500 above the contract price, the plaintiffs were entitled to damages of £5,500 in lieu of a decree for specific performance. It was wrong in principle to limit damages to the amount which the parties had in contemplation⁹. Vexation and disappointment are relevant considerations in assessing compensation¹⁰.

3. Contract for the sale of goods.—The normal rule for computing damages for non-acceptance of goods would be the difference between the contract price and the market price of such goods at the time when the contract is broken. If there is no available market at the place of delivery, the market price at the nearest place or the price prevailing in the controlling market may be taken into consideration¹¹. Computation of damages on the basis of difference between the contract rate and the lowest market rate prevailing at the time of breach is neither unreasonable nor illegal¹². Upon a breach of a contract for the sale of goods the measure of damages is the difference between the contract price and the market price at the day of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can upon that date. If the seller retains the goods after the breach he cannot recover from the buyer any further loss if the market falls nor is he liable to have the damages reduced if the market rises¹³. The date of breach will be the date of the final refusal to take delivery¹⁴. Where there is a market and the seller has no notice of any contract entered into by the buyer, the market price in the case of failure to

⁶ *Pakala v. Appana*, 29 IC 471.

⁷ *Manners v. Pearson*, (1898) 1 Ch 581 : (1895-99) All ER Rep 415, cited in *Shakoor & Co. v. Finlay & Co.*, 79 IC 291.

⁸ *Tikaya v. Jiwan*, 83 IC 773.

⁹ *Wroth v. Tyler*, (1973) 1 All ER 897.

¹⁰ *Jarvis v. Swans Tours Ltd.*, (1973) 1 All ER 71 CA.

¹¹ *Bungo Steel Furniture v. Union of India*, AIR 1967 SC 378.

¹² *M. N. Gangappa v. A. N. Setty & Co.*, AIR 1972 SC 696.

¹³ *Jamal v. Moolla Dawood*, 43 IA 6 head note; *Asmatullah v. Bihari*, 68 IC 912; *Arjuna v. Harakchand*, 172 IC 812; *United Brokers v. Alagappa Corp.*, 1948 M 391 (date of filing of plaint).

¹⁴ *Hoe v. Chotalal*, 1939 R 139.

deliver is the test by which to estimate the value of the goods, 'independently of any circumstances peculiar to the buyer and so independently of any contract made by him for sale of the goods'¹⁵. Extraneous circumstances do not affect the measure of damages, which will be the difference between the contract and the market price prevailing at the place of delivery. Thus, the fact that owing to food control by the Government, an undertaking had to be given on the transport of paddy (contracted to be sold) from the place of delivery to charge not more than four annas a bag above the contract price would not have the effect of limiting the damages at four annas a bag¹⁶. In an action against the seller for non-delivery of goods the measure of damages, in the absence of any special damage proved by the plaintiff, is the difference between the contract price and the price at the time stipulated for delivery and not at the time of trial. The purchaser is entitled to a refund of the purchase money with simple interest that may have been paid to the vendor¹⁷. The market price will be calculated at the rate prevailing in the early part of the day¹⁸. On a breach of contract for the sale of goods of particular shipments, the due date with reference to which damages have to be calculated is the time of performance, i.e., the date of arrival of the goods¹⁹. A breach of contract is committed on failure to purchase an article to be delivered at a specified period at a fixed rate. Such breach entitles the seller to claim damages²⁰. "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods"¹. Under a contract for the sale of goods "subject to safe arrival", the sellers' obligation is to ship the goods or to get them so far under his control that they are put on board some ship or other. But, having shipped them, if any accident occurs in transit, then they are not liable for non-delivery. But the sellers would be liable in damages if they did not ship the goods, the measure of which would be the value of the goods to the buyer when they ought to have arrived². Where owing to repairs in the mill, delivery could not be fully given and the defendants took no steps to arrange delivery from some other mill, they were held liable in damages³. Where there is an undertaking given to sell at a particular place, damages are not to be assessed on the basis of such profits

15 *Rodocanachi v. Milburn*, 18 QBD 67, 77, approved in *Williams Bros. v. Agius*, 1914 AC 510 : (1914-15) All ER Rep 97, applied in *Jamal v. Moolla Dawood*, 43 IA 6 ; *Valpy v. Oakeley*, 20 LJQB 380 : 16 QB 941 ; *Mackay v. Kameshwar*, 56 CLJ 135 PC ; *Gopal v. Hari*, 1936 A 514.

16 *Bolisetti v. Vekkalagadda*, 115 IC 342.

17 *Startup v. Cortazzi*, 4 LJ Ex 218 ; *Hassan v. Asiatic Petroleum Co.*, 4 IC 1124 ; *Gangaram v. Hariram*, 102 IC 628.

18 *Tara v. Budh*, 6 IC 485.

19 *Ganesh v. Bashesar*, 107 IC 278 ; *Durga v. Ganesh*, 107 IC 276.

20 *Jamal v. Yokohama S. Bank*, 163 IC 516.

1 *Rodocanachi v. Milburn* 18 QBD 67, fold in *Santdas v. Nidhan*, 66 IC 267 ; in *Williams Bros. v. Agius*, 1914 AC 510 : (1914-15) All ER Rep 97.

2 *Barnett v. Javeri*, (1916) 2 KB 390.

3 *Mangoomal v. Hansraj*, 156 IC 561.

if the buyer were free to sell elsewhere at a higher rate. Where a party to a contract goes on making deliveries towards the contract after the time fixed for the same, it may mean that although in default he chooses to treat the contract as subsisting⁴ and goes on making deliveries, or it may mean that the other party at his request, express or implied, is willing to wait for delivery after time⁵. The other party, of course, is not bound to take delivery but may put an end to the contract on the date fixed and claim damages on the basis of the market rate on that day⁶. Damages are recoverable on forfeiture of shares⁷. A transferee with notice of a contract for sale of shares is liable in damages for breach of contract by transferring the shares to others.⁸

On a buyer refusing to take delivery or failing to perform his part, a breach of contract takes place and the seller's remedy in such a case is indicated in illustrations (c), (d) and (h). When the property has passed to the buyer the seller may sue for the price and give up the claim for damages. A seller commits a breach of the contract when he fails to deliver, as in illustrations (a), (j), (k), (o), (p) and (q), or fails to comply with the warranty, as in illustration (m). Of illustration (a) it has been observed that its language is general and wide and it makes no exception on account of special circumstances like the following, (i) a case where B could have used some other substitute for saltpetre, (ii) a case where B was made a gift of 50 maunds of saltpetre as substitute on the date fixed for delivery by A, (iii) where there was no market at all for the saltpetre at the place of delivery. The law as stated in this illustration gives an unconditional right to B to get the difference between the contract price and the cost which he would have had to incur to obtain the like quantity of saltpetre⁹. If A contracts to buy goods of a certain description from B and refuses, for other reasons, to accept the goods tendered by B as in performance of the contract, he cannot escape liability to pay damages by proving afterwards that the goods tendered were not of the contract description¹⁰. The enforceability of a contract does not depend on the implied term that it is to be dependent on the ability of the vendee to find customers for his goods; a vendee breaking the contract on that ground is liable in damages¹¹. If a commodity is to be sent to England where there is a free market for the commodity from India where there is no market for that commodity, the damages for the breach are the value to the plaintiffs of the portions that ought to have been delivered on specified dates at the prices they would have got for them in England less the cost of transport¹². When there is no

4 As in *Ashmore v. Cox*, (1899) 1 QB 436.

5 As in *Ogle v. Vane*, LR 3 QB 272, commented in *Brandt v. Morris*, (1917) 2 KB 784 : (1916-17) All ER Rep 925.

6 *Bolisetti v. Venkkala*, 115 IC 342.

7 *Re Bolton*, (1930) 2 Ch 48 : (1930) All ER Rep 628.

8 *Bank of India v. Jamsetji*, 1950 PC 90.

9 *Hajee Ismail v. Wilson & Co.*, 41 M 709; *Pannaji v. Senaji*, 1934 B 36 (damages are assessed on the day of failure to take delivery).

10 *Bratthwaite v. Foreign Hardwood Co.*, (1905) 2 KB 543 74 LJ KB 688 : 92 LT 637.

11 *Samuel Fitz v. S.C. & S.W.Co.*, 1945 M. 291.

12 *Cooverjee v. Rajendra*, 36 Cal 617.

market for the goods at the place of delivery, the buyer may procure a substitute at a higher cost, if it be a reasonable and business-like thing to do and calculated to diminish the loss, and may recover the difference in price as damages from the seller. It has not yet been decided that he is bound to do so and apparently he may refrain from doing so and rely on his claim for damages. Where the buyer was under a contract to resell, the resale price is evidence of the value of the goods at the place and time of delivery¹³. The price of obtaining the nearest substitute of the goods of a slightly superior quality at a slightly higher price may be allowed to be recovered as damages¹⁴. Sub-contracts might be put in evidence to prove the value of goods¹⁵. The buyer therefore may procure the nearest substitute that he reasonably can and charge the seller with the difference. Where that is not done it is necessary to ascertain as nearly as possible the value of the goods at the several times at which the contract was broken and to give the plaintiff as damages the sum of the difference between the contract price and the value at the several dates of breach. If there be no material available to arrive at the value necessary for the estimate, then no more than nominal damages can be given. The price obtained upon a resale may, in the absence of the market rate, be accepted as evidence of actual value. The settlement made by the plaintiff with other persons, which was not a resale but bore some analogy to repurchase was, under the special circumstances of the case, received in evidence for the purpose of enabling the court to fix the actual value of the goods on the dates of the breach¹⁶. When there is no market for the sale of goods, damages are represented by the difference between the contract price and the price he obtains on resale¹⁷. In an action for damages for breach of contract to deliver certain goods the plaintiff claimed to recover the difference between 70 s., the market price at the port of delivery on the due date, and 42 s. 6 d., the market price at the same place on the date of actual delivery. But inasmuch as he had resold the goods at 65 s. a ton he was held entitled to recover only 5 s. a ton. The market price at Chicoutimi was for the purpose of ascertaining the measure of damages taken to be the market price at Manchester, despite the distance which separates them, of course, less the cost of carriage¹⁸.

When a contract is repudiated and the article is resold within a reasonable time from repudiation, the measure of damages is the difference between the price of the article at the time of the contract and the time of the resale, the latter being regarded as the market price¹⁹. A repudiation by one party alone does not terminate the contract. The question whether the termination

13 *Hajee Ismail v. Wilson & Co.*, 41 M 709; *Stromsbruks v. Hutchinson*, 1905 AC 515; *Erie County Gas Co. v. Carroll*, 1911 AC 105.

14 *Hinde v. Liddell* LR 10 QB 265; *O'Hanlan v. G. W. Ry.*, 6 B & S 484, 491.

15 *Arpad*, 1934 P 189.

16 *Jugmohandas v. Nusserwanji*, 26 B 744.

17 *Dunkirk Colliery v. Lever*, 9 Ch D 20.

18 *Wertheim v. Chicoutimi Pulp Co.*, 1911 AC 301 : (1908-10) All ER Rep 707.

19 *Stewart v. Cauty*, 10 LJ Ex 348; see *Pott v. Flather*, 16 LJQB 366, resale not made within reasonable time.

was valid or not and whether damages are recoverable for such wrongful termination does not affect the arbitration clause or the right of a party to invoke it for appointment of arbitrator²⁰. Where the buyer failing to accept delivery of and pay for the goods on the due date retransferred the bargain at a certain price, *held*, there could be no better proof of the market value on the due date than the price of resale by the buyer¹. Where the contract is one for the sale of goods, one of the modes in which a party to it may, on the default of the party bound to perform it, perform it, is by going into the market and buying goods of a description and quality similar to those contracted for, but if he purchases at a sum equal to or less than the contract price he can only recover nominal damages, because the cost of procuring the substituted article not being greater than the contract price, he has got goods equal to those contracted for and at the same or less cost and has therefore suffered no loss². For failure to give delivery of goods bought the buyer is entitled to recover the purchase money with interest as also to damages for breach of contract measured on the basis of difference between the contract and the market rates at the date of the breach³. Where a purchaser of goods resold them before the breach of the original contract and the market price at the date of the breach was higher than the resale price, the court observed: "It is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having these goods, and this he can do by going into the market and purchasing them at the market price....This difference is, therefore, the true measure of his loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled"⁴. Where goods were bought for resale the original buyers were held entitled to recover the damages and costs paid by them to their purchasers from the original seller⁵. In a transaction of sale and repurchase if the price of repurchase be not mentioned the only equitable inference is that the market value was contemplated⁶. A distinction is drawn between goods which are marketable and which are not marketable, and it is laid down that in the latter case the price of goods is the measure of damages⁷. Where goods are to be delivered on a certain date but have not been so delivered, the party whose contract has not been fulfilled ought to be compensated by being placed as nearly as possible in the same position as that in which he would have been had the contract been fulfilled by the goods being delivered on the date agreed upon. Interest cannot be given on such unliquidated damages. The measure of damages for late delivery is the difference between the market

20 *Damodar Valley v. K. K. Kar*, AIR 1974 SC 158.

1 *Mehr Chand v. Jugal Kishore*, 6 Lah 415.

2 *Valpy v. Oakley*, 16 QB 941; 117 ER 1142; 20 LJ QB 380; *Western Wagon Co. v. West*, (1892) 1 Ch 271; *Erie &c. Fuel Co. v. Carroll*, 1911 AC 105, 117.

3 *Rameshwar v. P. S. Ltd.*, 1944 B 21.

4 *Williams Brothers v. Agius*, 1914 AC 510, 530; (1914-15) All ER Rep 97.

5 *Pinnock Bros. v. Lewis & Peat*, (1923) 1 KB 690; 92 LJ KB 695.

6 *Maung Hla v. Mu*, 104 IC 676.

7 *Gepp v. French Cigarettes Co.*, 135 IC 599.

price on the due date of delivery and on the day of actual delivery. Purchaser must prove the loss or damage sustained by him. Where the purchaser sells the goods after late delivery, the damages are assessed on the basis of the difference between the market price on the due date and the price actually obtained by resale. Where the resale price is not proved, the purchaser is not entitled to any damages⁸. The general rule affecting damages in every case when breach of contract takes place is that the plaintiff by way of damages is entitled to be put in the same position as he would have been in if the contract had been completed. In the case of a breach of contract arising out of the purchaser's refusal to accept goods to be made to order by the vendor, the measure of damages is the profit which the vendor would have made if the contract had been carried out⁹.

Where the time for performing a contract of sale has been postponed at the request either of the vendor or the purchaser and the contract is ultimately broken this has the effect of deferring the period at which the breach takes place. In such a case damages are to be calculated with reference to the last date, if any, to which the contract was extended or to the date on which the contract was finally broken¹⁰. As pointed out in *Behn v. Burness*¹¹, as soon as a contract has been broken by late delivery, the obligation of the purchaser to take delivery of the goods vanishes; he is not bound to accept the goods when they are delivered late. In such a case the right measure of damages is the difference between the contract price and the market price on the date of delivery originally agreed upon by the parties¹². So also it is open to the seller to avoid the contract when the buyer fails to take delivery: he cannot elect to keep alive the broken contract in hopes that he may recover heavier damages for the breach of the contract than he will be entitled to recover at the time of the breach. In such cases the measure of damages is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract. Where, however, the time for performing the contract has been postponed and the contract is ultimately broken, the date of breach is shifted to the date at which the plaintiff refuses to grant further indulgence or at a reasonable period after the last grant of indulgence¹³. Where a dealer in flour at Rangpur wrote a letter to a firm at Allahabad asking for rates and proposing the supply of goods in a certain manner and a quotation was furnished but later on the rates quoted were sought to be altered, *held*, that there was a concluded contract and the rate of damages should be the difference

8 *Boddu v. Kotra*, 21 IC 543; *Union of India v. Baijnath*, 1951 Pat 219.

9 *Re Vic Mill*, (1913) 1 Ch 183, affmd 465.

10 *Ogle v. Vane*, LR 3 QB 275, fold in *Hickman v. Haynes*, LR 10 CP 598, cited in *Kidar v. Shimbhu*, 8 Lah. 198; *Appana v. Piple*, 125 IC 225; see *Williams v. Agius*, 1914 AC 510; (1914-15) All ER Rep 97; *Paper Sales v. Chokhani*, 1946 B 429.

11 3 B & S 751, 759.

12 *Kali v. Ismail*, 20 CLJ 133, *Grenon v. Lachmeenarain*, 23 IC 119 fold.

13 *Mohanlal v. Gyaniram*, 155 IC 778; see *Jamal v. Moolla Dawood*, 43 IA 6 cited ante.

between the price prevailing at Rangpur on the day of delivery and the contract rate together with the cost of freight¹⁴. A promisee, however, is not entitled for his purposes and without the consent of the promisor to extend the time for performance. Where the defendant fails to deliver within the time fixed by the contract and the plaintiff demands delivery of the goods within the fixed time and the demand is not complied with, the damages are assessed with reference to the market rate on the date of expiry of the period agreed upon as the time for delivery in the contract¹⁵. There must be an agreement for the postponement of the date. If the buyer is satisfied with the quality of the goods and demands a survey, some time must elapse but that does not postpone the date of breach. The date of breach must be the due date unless the parties come to an agreement that the due date shall be postponed until it is ascertained whether the goods are of the contract quality or not¹⁶. If without any request from the seller the buyer forbears to claim delivery for his own convenience, the buyer is not entitled on account of his forbearance to claim the benefit of a rise in the market price after the stipulated time when the delivery was to be made.¹⁷

In the case of goods purchased for use damages assessed on the usual basis bear no relation to the buyer's actual loss. Illustration (a) says that the measure of damages in this case is the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of a like quantity at the time when they ought to be delivered¹⁸. As Mr. Mayne has observed "damages will be assessed with reference to its value to the purchaser. But its value will be determined by other considerations, that is to say, by the use or which it was intended, the loss which followed from its not being supplied, and the profit which would have been made out of it if it had been delivered in time." Thus the extra costs of procuring a substitute, but not special damages of which the defendant had no notice¹⁹, compensation for deterioration of goods consequent on delay in delivery of the article according to the contract²⁰, may be allowed to the plaintiff as damages.

Ordinarily damages are to be calculated at the market rate prevailing on the date on which the breach of contract was committed. Where no time is fixed for delivery, the contract subsists until it is terminated by the plaintiffs giving notice to the defendant that they will not accept delivery after a certain date. The case comes within the purview of illustration (c) to the section.

14 *Madhusudan v. Badridas*, 31 CLJ 93.

15 *Muthayamanigaran v. Lakhu Reddiar*, 22 MLJ 413; *Chetty v. Kyin*, 64 IC 60; *Mansa v. Mangal*, 65 IC 497, 502; *Mutanhella Bros. v. Mahabir Industries*, AIR 1970 Pat 91, 94.

16 *Ramchandra v. Vassanji*, 45 B 129.

17 *Re Voss*, LR 16 Eq 155; *Plevins Dawning*, 1 CPD 220 : 45 LJ QB 695 : 35 LT 263.

18 *Hajee Ismail v. Wilson & Co.*, 41 M. 709; *Shridhan v. Gordhandas*, 26 B 235.

19 *Portman v. Middleton*, 4 CBNS 322.

20 *Smeed v. Ford*, 1 E & E 602, 28 LLJB 178; *Tarachand v. Dreyfus & Co.*, 35 IC 449.

The damages should be calculated on the difference between the rates prevailing in the market on the date when the plaintiff by notice put an end to the contract and the contract rate¹.

4. Delivery in instalments.— it is well settled that an agreement to accept delivery by instalments may, in the absence of an express agreement, be inferred from the conduct of the parties and the circumstances of the case. In the absence of any indication to the contrary the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of goods. In a contract for the purchase of 300 tons of Java sugar it was stipulated "shipments to be made by steamers during July to December 1914.....the agreement to be construed as a separate contract in respect of each shipment." On the breach of such a contract before expiry of the last date of performance the damages should be assessed upon this principle : "where there is a contract for the sale and delivery of goods at a future time, or in instalments at future times, a notice by the seller to the buyer of his intention not to deliver may be accepted and acted upon as an immediate breach and the buyer is *prima facie* entitled to damages measured by the difference between the contract price and the market price at the appointed time or times of delivery, leaving it to the seller to show in mitigation that he could in the interval have obtained a new contract upon better terms, or if the time for delivery has not elapsed when the damages are assessed, the future damages must be estimated prospectively"². Where the defendant had entered into a contract with the plaintiffs to purchase from them a quantity of gunny bags, delivery to be taken at certain stated times, it was regarded as immaterial that the sellers never had the goods in their possession, for it was proved that they could have obtained them, *e.g.*, under a contract they had with a third person, and that they were ready and willing to deliver the goods at the times contracted for³.

If goods are to be delivered in equal portions during certain months, the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed. Therefore, the plaintiff is entitled to recover as damages the difference, at the end of each month, between the contract price and the market price of the goods deliverable in that month. If the plaintiff has paid the sub-purchaser the difference, or to satisfy a sub-contract has bought at the then market price, he will be entitled to receive it from the defendant. The plaintiff is not bound, on being apprised of breach of the contract by the defendant, to enter into a new contract to the same effect as the old one⁴. The same rule applies in the case of an executory contract, *i.e.*, the contract being for the delivery of goods on future specified days, the defendant had

1 *Gauri Dall v. Nanik Ram*, 35 IC 203 ; *Hoe v. Chotalal*, 1939 R 139.

2 *Bilasiram v. Gubbay*, 43 C 305, Leake, 6 Ed p. 638 cited ; *Dominion Coal Co. v. Dominion, I & S. Co.*, 1909 AC 293.

3 *Cohen v. Cassim*, 1 C 264.

4 *Brown v. Muller*, LR 7 Ex 319.

before the time appointed for the last delivery declared that he will not perform the contract and the plaintiffs have elected to treat that as breach and to bring their action⁵ unless the defendant shows that another similar contract might have been obtained on more mitigated terms⁶. It does not matter that there has been a rise in prices caused by an increase in its value, or by a sudden demand for it, or by any other reason, the measure of damages will be the difference between the contract price and the market price at the several dates of delivery⁷.

If the vendor has any specific period of time (here August or September) allowed to him to deliver goods, and before the time has elapsed he gives notice to the purchaser that he will be unable to complete the delivery and refuses to proceed with the contract, the purchaser not rescinding the contract under S. 39, the measure of damages is the difference between the contract price and the higher price of the subject matter on the last day of the period within which the delivery ought to have been made. There is a difference between delivery in 'August and September' and 'August or September'. It is implied in the former case that the goods may be delivered in instalments throughout that period, the whole contract to be completed in the two months. In the latter case the whole contract may at the seller's option be completed in either of these two months⁸.

5. Loss of profit on resale.—The fact that a binding agreement has been arrived at does not of itself create a responsibility for all the injury flowing from a breach of it. The wrong-doer is *prima facie* only liable for the natural and ordinary consequences of the breach; but where at the time of entering into the contract both parties know and contemplate that if a breach of the contract is committed some injury will accrue, in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation in damages upon the occurrence of that injury. Thus, where the contract states that the purchaser wants the article agreed to be made in order to help him to carry out another contract, the contractor, if he commits a breach in the delivery of the article, is liable for the loss sustained by the purchaser if he becomes unable to carry out that other contract. A person contemplates the performance and not the breach of the contract; he does not enter into a kind of second contract to pay damages⁹. Plaintiff is not entitled to recover damages for loss of profit on resale where the seller knows generally that the goods are purchased with a general intention to resell them but is not aware of the sub-contract at the time of sale¹⁰. But if the sellers knew that the buyers were buying for resale, the buyers would be entitled to damages on the difference between the contract price

5 On the principle laid down in *Hochester v. De La Tour*, 22 LJQB 455 : (1843-60) All ER Rep 12.

6 *Roper v. Johnson*, LR 8 CP 167; *Frost v. Knight*, LR 7 Ex 111 : (1861-73) All ER Rep 221.

7 *Josling v. Irvine*, 30 LJ Ex 78; *Brown v. Muller*, LR 7 Ex 319.

8 *Mackertich v. Nobo Coomer*, 30 C 477.

9 *Hydraulic Engineering Co. v. McHaffie*, 4 QBD 670, 674.

10 *Thol v. Henderson*, 8 QBD 457.

and the resale price¹¹. If there be no market for the goods, then the sub-contract by the plaintiff, although not got to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what is the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value¹².

Where plaintiffs sued the defendant for breach of a contract for non-delivery of coal and claimed damages on the basis of the difference between the contract price and the resale price, *held*, they were entitled to the difference between the contract price and the market price when the breach occurred. The extra profits which the purchaser might have made under his contract of sale with another party were not allowed, as there was no contract to supply to the party the identical coal in question. The case did not resemble an ordinary contract of resale. It was also pointed out that the authorities in England seemed to go to the length of holding that notice to the seller of the special purpose for which the purchaser required the goods was not enough; that to make the seller liable for the additional damage, he must have, expressly or impliedly, contracted to run the additional risk. *Querry*, whether under this section notice would be enough to make a vendor liable where he did not contract to run the risk¹³. Where damages are claimed on the basis of resale but not proved, on appeal damages cannot be claimed on the basis of the market price¹⁴.

In the case of goods which the seller knows are intended for resale, damages are assessed on the basis of the difference between the contract price and the price at the date of the arrival of the goods at their ultimate destination and not the place of delivery to the immediate buyer¹⁵. The buyer is not entitled to recover from the seller the loss of profits by a resale on account of a rise of prices after contract but before breach by the seller, unless the seller was made known of the sub-sale and was informed that he would be held liable¹⁶.

In case of a chain or a string of contracts, *i.e.*, where there is the same contract passing along the same articles from hand to hand, with the same warranty (particularly, in a case where the breach of contract which gives rise to the damages consists in there being in that article something which the maker of it and each vendor of it knows can only be discovered to exist when it comes into the hands of the person who is ultimately going to put it into use), the damages recoverable will include damages which a purchaser pays to his purchaser, together with the costs of action.¹⁷

11 *Patrick v. R. B. Grain Export Co.*, (1927) 2 KB 535 : (1927) All ER Rep 692; *Agius v. G. W. Colliery*, (1899) 1 QB 413; *Hammond v. Bussey*, 20 QBD 79.

12 *Grebert-Borgnis v. Nugent*, 15 QBD 85.

13 *Keshavlal v. Diwanchand*, 50 IA 142.

14 *Tikami v. Kakhia*, 1937 L 842.

15 *Van Den v. Martens*, (1920) 1 KB 850; *Union of India v. Venkataiah*, AIR 1975 Mad 119.

16 *Williams v. Reynolds*, 34 LJQB 221.

17 *Kasler & Cohen v. Slavouski*, (1928) 1 KB 78.

6. Wrongful dismissal of servants.—Damages for wrongfully dismissing a servant include claims for wages for the period the servant was entitled to notice and the tips or profit he would have earned during that period, also damages in respect of the time which might reasonably elapse before he could obtain another employment, but exclude compensation for the injured feelings of the servant, or for the loss he might sustain from the fact of his dismissal making it more difficult for him to obtain a fresh employment¹⁸, but the possibility of his getting another employment, equally good for the remainder of the period of service is to be taken into account¹⁹. For damages recoverable by Government servants on wrongful dismissal see *Secretary of State v. D'Attaiides*²⁰. In a suit for damages for wrongful dismissal of a servant, the court may consider the question whether there were good grounds for dismissal¹. A workman is entitled to damages assessed on the basis of his earnings previously to the dismissal². A claim for commission which the servant would have earned cannot be included in damages³. But on breach of a contract by a theatre manager, an actor was entitled to damages for the loss of the advertisement, reputation and publicity the latter would have enjoyed had the contract been performed. The case, it was observed, was not similar to the mere engagement of the services of a servant⁴. A governess is not a menial servant⁵. "It is not necessary that a servant should be dismissed by a master for a valid reason ; it is sufficient if a valid reason, in fact, exists, even if the master be not aware of it at the time of dismissal." But the principle does not apply where the master with knowledge of such facts deliberately condones them or waives his right to dismiss the servant on account of them⁶. A responsibility for damages arises for breach of a contract of service for a fixed term, but where a fresh agreement is entered into between the parties, damages will be recoverable up to the date of the new agreement and not for the whole of the remaining term⁷. A Government servant who has been dismissed is not entitled to any relief by way of damages for wrongful dismissal⁸. An agent appointed for a definite period is entitled to the stipulated salary for the full period, unless he had an opportunity of other employment and refused to avail himself of it. The principle, that a person must do what he can to mitigate damages, applies to a contract of service as

18. *Addis v. Gramophone Co.*, 1909 AC 488 : (1908-10) All ER Rep 1 ; *Manubens v. Leon*, (1919) 1 KB 208 : (1918-19) All ER Rep 792 tips allowed as damages ; *Meenakshi Mills v. Iyar*, 122 IC 507.

19. *Brace v. Calder*, (1895) 2 QB 253 : (1895-99) All ER Rep 1196.

20. 12 Rang 556.

1. *Girdhari v. S. of S.*, 1937 L 226.

2. *Devonald v. Rosser*, (1906) 2 KB 728 : (1904-07) All ER Rep 988.

3. *Es p. Maclure*, LR 5 Ch 737 ; *Rhodes v. Forwood & Walter*, 1 AC 256 : (1874-80) All ER Rep 476.

4. *Clayton v. Oliver*, 1930 AC 209 : (1930) All ER Rep 414, expld. in *Withers v. General Theatre Corp.*, (1933) 2 KB 536 : (1933) All ER Rep 385.

5. *Moult v. Halliday*, (1898) 1 QB 125.

6. *Saxton v. Dossa*, 15 IC 757.

7. *Lachmandas v. Raghumull*, 47 C 290 PC.

8. *Surej v. N. W. F. Province*, 1942 FC 3.

it applies to an ordinary commercial contract⁹. Even if the master is entitled to dispense with the servant's services on the ground of his absence, if the employment be continued, the master is liable under the contract to pay the agreed wages¹⁰. It is a question of fact to be decided in the circumstances of each case whether the absence of a servant on account of ill-health is sufficient for the master to presume that the servant will not be able to perform his contract for the rest of the stipulated period¹¹. There is no authority for holding that a monthly servant is entitled to a month's notice; it would seem that in the absence of any express agreement or established custom to the contrary, the contract of service is terminable by reasonable notice¹². The custom as regards a month's notice has obtained judicial recognition in England¹³. But the rule does not apply to a case where the servant has given a month's notice, but a few days before the expiry of the time the master dismisses him. In such a case the damages are the actual pecuniary loss which has been sustained by the servant¹⁴. Recovery of damages for dismissal without notice determines the contract of service¹⁵. The Civil Court has no jurisdiction to entertain suits for damages by servants in certain cases¹⁶.

7. Notice of special circumstances.—The principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object¹⁷. Where the plaintiffs delivered to the defendant several cases containing machinery for the erection of a saw-mill at Vancouver Island, the defendant knew generally of what the shipment consisted, and on arrival of the vessel one of the cases containing an essential part of the machinery was missing and the mill could not be erected until the article was replaced, the defendant was liable for the loss of the machinery, but not for the loss of profits the mill would have made if erected¹⁸. Where on account of delay, in the delivery of certain bales of cotton entrusted to a railway company for carriage the plaintiff's mill was stopped from running, the plaintiff was not entitled, in the absence of any special communication to the defendant company, to recover

9 *Roper v. Johnson*, LR 8 CP 167, 181; *Finlay v. Handel*, (1928) 2 KB 604, 614; (1928) All ER Rep 110 refd. to.

10 *Sundaram v. Chockalingam*, (1938) 1 MLJ 857, refing to *Hanley v. Pease*, (1915) 1 KB 698, 705; (1914-15) All ER Rep 984.

11 *Burma Oil Co. v. Naraindas*, 104 IC 185.

12 *David v. Supdt. St. Anthony's School*, 63 IC 982, servant must use diligence in obtaining employment to minimise the loss; *Baldeo v. Sachdev*, 1934 R 107 (a month's notice); but see *S. of S. v. Burrowes*, 1937 L 549.

13 *Todd v. Kellage*, 22 LJ Ex 1.

14 *Lindsay v. Queen's Hotel*, (1919) 1 KB 212; (1918-19) All ER Rep 612.

15 *Barnsley v. Taylor*, 37 JQB 39.

16 *Malik v. Dist. Board*, 1940 L 71.

17 *Simpson v. L. & N. W. Ry.*, 1 QBD 274, cited in *Fazl Ilahi v. E. I. Ry. Co.*, 43 A 623, 631; *Hawes v. S. E. Ry.*, 54 LJQB 174.

18 *British Columbia &c. v. Nettleship*, LR 3 CP 499; (1861-73) All ER Rep 339; *Sunley & Co. v. C. W. S.*, (1939) 2 KB 791.

from the company the wages paid and the loss of profit incurred by him¹⁹. A collector of telegraphic messages for transmission is not liable for the loss of profit but only for nominal damages for negligently omitting to send the plaintiff's message²⁰. Where a cloth-cap-manufacturer sued a railway company for not delivering the cloth within a reasonable time, the plaintiff was entitled to recover as damages the amount of diminution in value of the cloth by reason of the season for making up and selling the caps having passed but not the loss of anticipated profits¹. The law has been thus summed up in *Wertheim v. Chicoutimi Pulp Co.*²: Where goods by reason of the delay in delivery becomes valueless or of less value to the purchaser the measure of damages in such a case is the difference between the contract price and the value of goods to the purchaser when obtained. The loss of anticipated profits can however be recovered from the railway company if they have notice of the reason why the things are being sent or of the arrangements which the plaintiff is making to utilise them at the destination, otherwise such damages will be remote³. The plaintiffs contracted to buy from the defendant sulphuric acid free from arsenic without telling them the purpose for which it was wanted. They were supplied with sulphuric acid containing arsenic which, in ignorance of this fact, was used by them for the manufacture of glucose for use by brewers. The beer brewed with it became poisonous and the brewers sued and recovered damages from the plaintiffs. The plaintiffs in the suit against their vendors were held entitled to recover the price paid by them for the impure acid and value of the goods that were rendered useless by being mixed with the poisonous acid. They were not entitled to recover for the loss of the goodwill of their business, nor the sums which the brewers to whom the plaintiffs sold the glucose were entitled to recover⁴. Where plaintiffs sent a quantity of shoes for sale in London at an unusually high price informing the railway company only as to the date of delivery but not of the exceptional loss on delay in delivery, the railway company was not liable for such loss⁵. Where goods are sent by carrier, the damages recoverable for default of delivery is the value of the goods at the place of consignment⁶. The measure of damages for breach of contract to carry goods is the value of the goods at the time when the goods should have been delivered. Loss of profits cannot be recovered unless brought to the notice of the carrier⁷. Even where special damages cannot be recovered because of the absence of knowledge of the extraordinary circumstances, yet if certain damages were in the contemplation of the parties they can be recovered⁸. The measure of damages for the

19 *Gee v. L. & Y. Ry.*, 30 LJ Ex 11 : (1843-60) All ER Rep 131; *Great W. Ry. v. Redmayne* LR 1 CP 329.

20 *Sanders v. Stuart*, 1 PD 276.

1 *Wilson v. L. & Y. Ry.*, 9 CBNS 632.

2 1911 AC 301, 308.

3 *Madras Ry. Co. v. Govinda*, 21 M 172, 178.

4 *Bostock & Co. v. Nicholson & Sons*, (1904) 1 KB 725, 741.

5 *Horne v. Midland Ry. Co.*, LR 8 CP 131 : 42 LJ CP 59.

6 *Rice v. Baxendale*, 30 LJ Ex 371.

7 *Jelli v. Dominion*, 1949 C 380.

8 *Corry v. Thames I. & S. Co.*, 37 LJQB 68 : (1861-73) All ER Rep 597.

breach of a contract to deliver a chattel is the average profit made by the use of such a chattel, where it cannot be procured in the market⁹. The buyer of a chattel for extraordinary purposes is not entitled to recover any larger damage unless a special purpose for which the article was ordered was made known to the seller¹⁰. Where the plaintiff contracted with A to repair a machine and employed the defendant to do the work without informing the defendant of his contract with A, on the defendant failing to complete the contract within the specified time, and the plaintiff, in consequence failing to complete the contract with A (though there was sufficient time to have the work done elsewhere) had to pay damages to A, the plaintiff could not recover such damages from the defendant¹¹. When there is collusion between the building contractor and the supervising engineer the owner is entitled to put an end to the whole contract, the measure of compensation is the loss which the owner would suffer in erecting a structure of the kind¹². The law does not regard collateral or consequential damages arising from delay in the receipt of money¹³.

8. Value of performance to plaintiff.—In a suit for damages for breach of a contract regarding the erection of a boundary wall, the general rule is that the plaintiff is entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the amount that it would cost to build the wall¹⁴. Similarly, where in respect of property purchased, a road across it was represented as "made up," when in fact it was not, the purchaser was entitled to compensation for damages sustained on the basis of "the difference between the actual value of the estate as it stood at the time of the purchase and what the actual value at the same date would have been" if the road had been made up as represented. "The cost of making really has nothing to do with it"¹⁵. In an action by a reversioner against a tenant for waste committed during the continuance of the term, the true measure of damages is the injury done to the value of the reversion¹⁶.

9. Part II: Remoteness.—"As regards remoteness, the test that is generally applied is to see whether the damages sought to be recovered follow so naturally or by express declaration from the terms of the contract that they can be said to be the result of the breach. This generally resolves itself into the question whether the damages flowing from a breach of contract were such as must have been contemplated by the parties as a possible result

⁹ *Fletcher v. Tayleur*, 25 LJCP 65.

¹⁰ *Cory v. Thames I. & S. Co.*, 37 LJQB 68 : (1861-73) All ER Rep 597.

¹¹ *Portman v. Middleton*, 27 LJCP 231; *Fisher v. Val de Travers*, (1874-80) All ER Rep 622 : 1 CP D 511; *Baxendale v. L. & C. D. Ry.*, LR 10 Ex 35.

¹² *Rajaram v. Madhao*, 1941 N 111.

¹³ *Bhabani v. Sarojini*, 1944 C 106.

¹⁴ *Wigsell v. School for the Blind*, 8 QBD 357.

¹⁵ *Re Chifferiel*, 40 Ch D 45.

¹⁶ *Witham v. Kershaw*, 16 QBD 613.

of the breach"¹⁷. Where a bank accepted the bills of a merchant but before maturity the bank stopped, the expenses incurred in arranging with another bank in raising the money was held to be not too remote but the natural and proximate consequence of the breach of contract by the first bank¹⁸. But in *Mayr v. Phani*¹⁹ damages for loss of profit were not allowed as being too remote. Where an inn-keeper contracted with a horse dealer to provide him with stabling for his horses to be sold at the local fair and in breach of that contract let out the stable to another, so that the plaintiff's horses were turned out and remained exposed to the weather and caught cold and were depreciated in value, the damage resulting from the cold was recoverable. In order to determine the question as to the remoteness of damages the court has to determine whether the case comes within any of the rules, namely, (i) whether the damage is the necessary consequence of the breach; (ii) whether it is the probable consequence; and (iii) whether it was in the contemplation of the parties when the contract was made²⁰. Where *D* sold chemical to *P* for industrial use without adequate warning to *P* of the danger of the chemical reacting violently to water and a violent explosion causing death and extensive damage occurred. *P* was held to be liable for the entire loss sustained though such terrible explosion was not foreseeable. The defence argument based on remoteness was rejected¹. A colliery owner suing a railway company has been held entitled to recover damages occasioned by loss of custom, such loss being not a remote but a direct and immediate consequence of the act of the company refusing to carry the coal². Where the plaintiff delivered certain goods to a carrier, the damages for delay in delivery may include cab hire or other reasonable expenses of calling at the defendant's office, but not hotel expenses³.

Damages for loss of business consequent upon a breach of contract by a railway company in not reaching a passenger to his destination in right time cannot be allowed, they being too remote. Reasonable expenses incurred by the passenger in reaching his destination may be recovered⁴. "The principle is that if a party does not perform his contract, the other party may do so for him as near as may be, and charge him for the expenses incurred in so doing," but this does not entitle the passenger as a matter of law to complete the journey by taking a special train. The rule as to what is reasonable under particular circumstances may be discovered by considering what a prudent person would do under the same circumstances⁵. Where under an agreement between the lessor and the lessee, the lessee was to pay to the lessor the rent, which the lessor was bound to pay to his superior landlord under his contract with the superior landlord, and owing to the failure of the lessee to pay the rent, the leased property was sold, the loss of the pro-

17 *Chaplin v. Hicks*, (1911) 2 KB 786 : (1911-13) All ER Rep 224.

18 *Prehn v. Royal Bank*, LR 5 Ex 92.

19 (1938) 2 Cal 88.

20 *Mc. Mahon v. Field*, 7 QBD 591.

1 *Vacwell Engineering v. B.D.H. Chemicals*, (1969) 3 All ER 1681 QBD.

2 *Lancashire &c. Ry. v. Gidlow*, LR 7 HL 517, 525, 527.

3 *Woodger v. G. W. Ry.*, LR 2 CP 318.

4 *Hamlin v. G. N. Ry.*, 26 LJ Ex 20 : 1 H&N 408.

5 *Le Blance v. L. & N. W. Ry.*, 1 CPD 286 : 45 LJ CP 521 : 34 LT 667.

party was not the natural consequence of the default of the lessee to comply with his covenant, for the lessor was primarily liable for the rent and he was entitled only to compensation for any loss (illust. n) which naturally arose in the usual course of things from breach of the contract⁶. Travelling expenses of the seller to go to the place where a breach of contract occurs for the purpose of reselling the goods are too remote for recovery⁷. Damages by way of compensation for the loss of the commission which a party would have got if it had been performed would be too remote unless the party could bring himself within the latter part of the first clause⁸. Where a lessee undertook to deposit the Government revenue payable by the lessor but the lessee defaulted and deliberately allowed the estate to be sold and never intimated the danger to the lessor was entitled to damages for breach of contract⁹. Similarly, a mortgagee failing to pay off a prior mortgagee with moneys left with him by the mortgagor is liable in damage, the measure of which will be the amount of profit which would have accrued to the mortgagor had the lands come to his hands after the prior mortgages had been paid off¹⁰.

The appellant, a contractor, entered into a contract with the Dominion of India for the supply of crores of pucca bricks according to a schedule. Delivery was to be at the kiln site. Owing to the default of the Government in not removing the burnt bricks which were ready for delivery and removal from the kilns according to contract, delay occurred in the time table of the Government for removal with the result that lakhs of katcha bricks were destroyed by rains. As this loss was occasioned by the default of the Government, the contractor claimed that he should be paid their price. The agreement between the parties contained an express stipulation that the Government "will not entertain any claim for damage to unburnt bricks due to any cause whatsoever". It was held that if the Government expressly stipulated, and the contractor expressly agreed, that the Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affair. But having contracted he cannot go back on his agreement simply because it does not suit him to abide by it. This is not to say that the Government is absolved from all liability, but all it can be held responsible for is for damages occasioned by the breach of its contract to remove the pucca bricks which it had undertaken to remove.

The contractor had a duty under section 73 of the Contract Act to minimise the loss; accordingly he would have had the right to remove the

6 *Girish v. Kunja*, 35 C 683, 689.

7 *Karachi Flour Mills v. Indo-Continental Agency*, 37 IC 7.

8 *Peer Mohamed v. Sakavath*, 43 MLJ 199, 207.

9 *Rohim v. Shajad*, 19 CWN 1311.

10 *Muhammad v. Kubra*, 15 IC 526; *Abdul v. Abdul*, 34 ALJ 940; *Rangasamy v. Venkatarama*, 28 IC 635; *Partab v. Balwant*, 48 IC 550; *Shiamlal v. Abdul*, 53 A 946; *Bishun v. Gaya*, 106 IC 831. Query, Whether the amount recovered is to be regarded as damages in all cases, see *Lachmi v. Deoki*, 19 IC 752, but see *Narain v. Basant*, 18 IC 449.

bricks himself and stack them elsewhere and claim compensation for the loss so occasioned.

Alternatively, he could have sold the bricks in the market and claimed the difference in price. But ordinarily he could not have claimed compensation for damage done to the katcha bricks unless he could have shown that that kind of damage, ordinarily too remote, was expressly contemplated by the parties when the contract was made (section 73 of the Contract Act). Here it is clear that this was in their express contemplation and they chose to provide against such a contingency by making an express clause in their contract.

There can therefore be no doubt that the contractor was not entitled to claim anything as the price of katcha bricks on this account, as the express stipulation relieved the Government from all liability under that head¹¹.

10. Anticipatory breach of contract.—The law with regard to damages on an anticipatory breach of contract has been thus fully set forth : An anticipatory breach occurs when the seller refuses to deliver before the contractual time for delivery has arrived and the buyer accepts his refusal as a breach of contract. It is settled law, when default is made by the seller by refusal to deliver within the contract time, that the buyer is under no duty to accept the repudiation and buy against him but may claim the difference between the contract price and the market price at the date when under the contract the goods should have been delivered. Further, in the case of an anticipatory breach the contract is at an end and the defaulting seller cannot take advantage of any subsequent circumstances which would have afforded him a justification for non-performance of his contract had his repudiation not been accepted. The true rule is that where there is an anticipatory breach by a seller to deliver goods, for which there is a market at a fixed date, the buyer without buying against the seller may bring his action at once, but that if he does so, his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived the court must arrive at that price as best it can. To this rule, there is one exception for the benefit of the defaulting seller, namely, that if he can show that the buyer acted unreasonably in not buying against him, the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages¹².

A contract for the sale and delivery of goods can only be dissolved by the consent of both parties. Notice by one party that he will not accept the goods does not rescind the contract. The contract, therefore, continues obligatory on both parties and the measure of damages for non-acceptance is the difference between the contract price and the market price when the goods were to be

¹¹ *Thawardas v. Union of India*, AIR 1955 SC 468. See also *Union of India v. Rallia Ram*, AIR 1963 SC 1685, and *Union of India v. W. P. Factories*, AIR 1966 SC 395.

¹² *Melachrino v. Nickoll*, (1920) 1 KB 693 : (1918-19) All ER Rep 657; *Roper v. Johnson*, LR 8 CP 167 criticised. As to anticipatory breaches see S. 39 n. 5.

delivered and not when notice of non-acceptance was given¹³. A contract is not discharged by the default of the promisor to comply with one of its essential terms but remains enforceable at the instance of the promisee¹⁴. If a contract is made for the sale of goods deliverable in the future by specified instalments at specified dates, and there is an anticipatory breach of the contract, the damages should be the difference between the contract price and the price at which the goods should have been delivered at different times. If, however, it could be shown by either party that the reasonable course for minimising damages was, for instance, for the buyer to enter into a forward contract when the repudiation was accepted, the damages should be assessed according to the difference between that price in that forward delivery and the contract price¹⁵. In a case of an anticipatory breach of contract to gin cotton at the defendants' mill the plaintiff could not be required by the defendants to buy the cotton which they had announced in advance they would not gin for him. The measure of damages was held to be not only the extra cost of ginning at other mills but the amount of profit the plaintiff could have made if the defendants had held to their contract with him¹⁶. The damages recoverable in the case of an anticipatory breach of contract, *i.e.*, if the action is brought before the time for performance provided for by the contract has arrived, must not be ascertained as from the date of the repudiation of the contract, but are to be calculated with reference to the market rate prevailing on the date on which the contract should have been carried out *i.e.*, the date on which delivery is due.¹⁷

11. Alternative promises.—Where a defendant makes default in performing one alternative, the performance of the other alternative becomes absolute and damages are assessed on this basis¹⁸.

12. Consideration paid for punctual delivery.—In an action for failure to deliver goods at specified times as contracted, the damages depend upon their market value at the time of breach and they remain the same even if the plaintiff contracted to pay more for punctual delivery at the specified times¹⁹. Where, however, the consideration price has been paid for a quantity of goods, the whole of which has not been received, the plaintiff is entitled to recover the excess money paid as money had and received to his use on failure of a part of the consideration²⁰.

13. Least beneficial to plaintiff.—Damages are in some cases assessed on the basis of what would be the least beneficial to the plaintiff. Thus, in an action for a breach of contract to publish in the form of a book certain

¹³ *Philpotts v. Evans*, 9 LJ Ex 33.

¹⁴ *Haradhone v. Bhagabati*, 19 CLJ 420.

¹⁵ *Millett v. Van Heck*, (1921) 2 KB 369 : (1921) All ER Rep 519.

¹⁶ *Rangopal v. Dhanji*, 55 IA 299.

¹⁷ *Krishna Jute Mills v. Innes*, 21 MLJ 182, 190; *Cooverji v. Rajendra*, 36 C 617; *Maung Po. v. Saw*, 150 IC 760.

¹⁸ *Mc Ilquham v. Taylor*, (1895) 1 Ch 53 : 64 LJ Ch 296.

¹⁹ *Brady v. Oastler*, 33 LJ Ex 300.

²⁰ *Devaux v. Conolly*, 19 LJCP 71 137 ER 658 : 8 CB 640.

articles which the plaintiff had written and for which he was to get 4d. a copy per book published, the measure of damages was held to be what the plaintiff would have recovered if a reasonable number of copies had been published. Where the obligation of wrongdoers is left to their discretion and there are several ways of performing it, the court assesses damages on the basis that "if the contracts could have been performed by the performance of the alternative least beneficial to the plaintiff, the measure of damages would be regulated by the loss occasioned by non-performance of that alternative". The general rule of damages no doubt is as stated in *Robinson v. Harman*¹, "where a party sustains a loss by reason of breach of contract, he is so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed"². Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burdensome to the defendant³. Where plaintiff advanced Rs. 100 to the defendant and the plaintiff broke the contract, thereby causing the defendant a loss of Rs. 40, the plaintiff was entitled to a decree for Rs. 60⁴.

14. Covenant for quiet enjoyment.—A covenant for quiet enjoyment is not broken simply by an interruption of the lessee's enjoyment, no damages are recoverable by him for such interruption, unless he proves that his enjoyment has been interrupted by an act of the lessor or of some person authorised by him⁵. A covenant for quiet enjoyment is interrupted where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the act of the lessor, or those lawfully claiming under him, although neither title to the land nor possession of it may be otherwise affected⁶, but if a tenant wants extraordinary protection for a particular branch of trade that he carries on in the demised premises he must bargain for it in his lease, otherwise he will not be entitled to recover damages for breach of the covenant⁷. Where a tenant for life granted a lease with an express covenant for quiet enjoyment, but after his death the lessee was ejected from the premises by the remainderman, the executor of the deceased lessor was held liable in damages for mesne profits for the unexpired term and for the cost of defending the action for ejection⁸. In case of a breach of restrictive covenants, the remedy by way of injunction is available against the assignee as also damages⁹.

On a claim for damages by a purchaser of land on account of eviction therefrom, the damages must be determined according to what may be

1 *Deverill v. Burnell*, LR 8 CP 475, 481 cited.

2 1 Ex 850, 855.

3 *Abrahams v. Reisch*, (1922) 1 KB 477.

4 *Cockburn v. Alexander*, 6 CB 791, 814.

5 *Rampratap v. Govind*, 107 IC 524.

6 *Harrison Ainslie & Co. v. Muncaster*, (1891) 2 QB 680.

7 *Dennett v. Atherton*, LR 7 QB 316, 326.

8 *Robinson v. Kilvert*, 41 Ch D 88; *M. S. & L. Ry. v. Anderson*, (1898) 2 Ch 394.

9 *Williams v. Burrell*, 14 LJCP 98; 1 CB 402; 135 ER 596.

10 *Matilal v. Ram*, 64 CLJ 308.

deemed to have been the intention of the contract between the parties to the sale. There is no hard and fast rule that the measure of damages must be the value of the land at the date of eviction, but may be the value of the property at the date of purchase¹¹. A covenant for title is an instance of a contract of which according to the English law there may be continuing breaches, so is a covenant to maintain a building in repair. There is a breach of the covenant for title so long as an adverse title exists, and there is a breach of a covenant to maintain a building in repair so long as the building is out of repair. But a breach of a contract to repay a loan on a certain day is not a continuing breach¹². For failure to liquidate debts, the amount of the debts is recoverable as damages even when the debtor becomes insolvent¹³. Damages are recoverable for breach of contract to pay insurance premium¹⁴.

15. Negligence.—If an act be determined to be negligent, then the question whether the particular damages are recoverable depends only on the answer to the question whether they are the direct consequences of the act¹⁵.

16. Contract to marry.—An express repudiation of a contract to marry may be treated as a breach and gives rise to an action for damages at once. Giving such notice at the earliest moment tends to mitigate, while delay in giving it necessarily aggravates, the injury to the party wronged¹⁶. In case of seduction under a promise to marry the plaintiff and subsequent refusal to marry, the plaintiff is entitled not merely to the loss sustained by not becoming the wife of the defendant but to compensation for aggravation of that loss by reason of her prospects of marrying being materially lessened¹⁷.

Damages awarded in English law for the breach of promise to marry form an exception to the general rule of damages in an action on breach of contract where such damages are limited to the consequences of the breach alone. In the former case the damages are in the nature of an indemnity to the injured party for the loss she has sustained and embrace compensation for injuries to the feelings, affections, wounded pride, as well as for the loss of marriage¹⁸. But in this country the law seems to be different. In a case for damages for breach by the defendant of his contract to give his daughter in marriage to the plaintiff, the ordinary damages which follow from S. 73 should be allowed as in the case of any other contract. Under S. 65 the plaintiff is entitled to the return of his consideration, or compensation in respect of it, as on a failure of consideration. The principle on which damages are allowed by the English law as peculiar to the breach of a contract to marry should not be applied to the case of a breach of a promise for valuable consideration made by the father of a girl to give her

11 *Zingragi v. Nagosa*, 99 IC 313.

12 *Mansab v. Ghulab*, 10 A 85.

13 *Ashdown v. Ingammells*, 5 Ex D 280.

14 *Schlesinger v. Mostyn*, (1932) 1 KB 349 : (1931) All ER Rep 812.

15 *Re Polemis & Furness*, (1921) 3 KB 560, 574 : (1921) All ER Rep 40.

16 *Frost v. Knight*, LR 7 Ex 111 : (1861-73) All ER Rep 221.

17 *Berry v. Da Casta*, LR 1 CP 331 : 1 H&R 291 : 35 LJ CP 191.

18 *Smith v. Woodfine*, 1 CBNS 630, 667 sq.

in marriage¹⁹. In one case damages were awarded against the father of the girl for breach of a promise to marry her to the plaintiff, although it was pleaded that she was not willing to marry the plaintiff for some time²⁰. But it has been pointed out that "the Hindu law, by which these parties are governed, enacts that a father may break off his daughter's engagement should a more suitable bridegroom be available. Under that law, then, the plaintiff never had more than a conditional right to the fulfilment of the contract upon which this suit is founded," so there can be no cause of action against the father¹. In awarding compensation for the breach of a promise to marry, the court may award any amount which appears to be reasonable not exceeding that named in the agreement². A suit for compensation for breach of a contract of marriage is excluded from the jurisdiction of the Small Cause Court³. A breach of contract of betrothal gives rise to a claim for damages⁴. Reasonable damages are to be allowed in such a case including compensation for possible loss of reputation and injury to feelings, but not compensation for any indirect loss caused by such breach⁵. Damages for breach of a contract of marriage may be awarded to a man⁶.

17. Covenant to repair.—The measure of damages, in case of a breach of a contract to repair, is not affected by the fact that the lessor has entered into a contract with a third party for the demolition for the building⁷. Nor is the standard to repair, and therefore for damages for non-repair, altered by the fact that the house in question cannot be put to the same use as before⁸.

Where there is a lease with a covenant to leave the premises in repair at the end of term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left. The measure of damages would not be affected by reason of the fact that by virtue of a contract between the lessor and a third party who agreed to take up the house on the expiry of the prior lease, the plaintiff suffered no harm⁹. There is a distinction between a covenant to keep and a covenant to yield up in repair, the true measure of damages in the former case is the diminished value of the reversion. If there be a sub-lease and the lessee sued the sub-lessee for breach of his covenant to keep in repair, in assessing damages, the court will take into account the liability of the lessee upon the covenants in the original lease¹⁰. In case of breach of a covenant to deliver up in

19 *Abdul v. Mahomed*, 42 B 499.

20 *Purshotamdas v. Purshotamdas*, 21 B 73; see *Jekisondas v. Ranchoddas*, 41 B 137; *Navakoti v. Ingilala*, (1951) 1 MLI 1.

1 *Khimji v. Narsi Dhanji* 39 B 682, 714.

2 *Maung Sein v. Ma E.*, 34 IC 159.

3 *Kali v. Koylash*, 15 C 833.

4 *Hira v. Jowala*, 27 IC 1008; *Santu v. Har*, 1934 L 544.

5 *Budhu v. Mansha*, 22 IC 644.

6 *Ma Ngue v. Po.*, 23 IC 376; *Purshotamdas v. Tribhovandas*, 21 B 23 fold.

7 *Rawlings v. Morgan*, 34 LJCP 185.

8 *Anstruther v. Mc. Oscar*, (1924) 1 KB 716; (1923) All ER Rep 198.

9 *Joyner v. Weeks*, (1891) 2 QB 31.

10 *Conquest v. Ebbetts*, 1896 AC 490; (1895-99) All ER Rep 622.

repair, the measure of damages will be the cost of putting the premises in the state of repair required by the covenant¹¹.

In a suit by a lessor against a lessee during the continuance of the term the measure of damages for breach of a covenant to repair is not the sum required to put the premises into repair but the loss to the landlord measured by the depreciation in the saleable value of the reversion. But at the end of the term if the repairing covenants are not performed, the landlord is entitled to recover the amount necessary to put them into repair, and the former sum, if realised, is to be subtracted from the latter¹². The provisions of any statute dealing with the right to recover or the liability to pay damages must be duly conformed with.¹³

18. Defect in article supplied or repaired.—Where on account of defective repair of a vessel she is detained, the plaintiff is entitled to recover damages for the loss sustained by such detention, it being the probable result of the breach of contract¹⁴. Where a gas company contracts to supply the plaintiff with proper service pipe to convey gas but supplies a defective pipe and there is an explosion due to the gas being set out on fire by a third party, the company is liable for the natural and necessary consequences of their work¹⁵.

19. Detention of goods.—In case of detention of goods the plaintiff is entitled to damages for such detention, if he has sustained any, even if the goods are subsequently delivered up¹⁶. A case of wrongful detention is governed by this section¹⁷.

20. What cannot be pleaded in mitigation of damages.—In a joint action for damages, the profits made by some of the plaintiffs individually cannot be pleaded in mitigation of damages¹⁸. In an action for injuries occurring in a railway accident, it was held that in estimating the damages the defendant could not take into the account the amount which the plaintiff received from an insurance policy¹⁹. A judgment-debtor can certify a payment made by him. If he fails to do so, he cannot claim damages from the decree-holder if the latter does not give credit for any payment alleged to have been made by the former and which is not certified²⁰.

21. Nominal damages.—Where no appreciable damages have been suffered by the plaintiff he can only recover nominal damages which are only a peg to hang costs on no sum at all. The nominal sum means in fact no sum at all but has a mere fictitious existence. Where the actual amount of

11 *Joyner v. Weeks*, (1891) 2 QB 31.

12 *Henderson v. Thorne*, (1893) 2 QB 164.

13 *Baxendale v. Hart*, 21 LJ Ex 123; *L. & N. W. Ry. v. Ashton*, 1920 AC 84 : (1918-19) All ER Rep 1155.

14 *Wilson v. General I. S. Colliery*, 47 LJQB 239.

15 *Burrows v. Marsh Gas & Coke*, LR 7 Ex 96 : (1861-73) All ER Rep 343.

16 *Crossfield v. Such*, 22 LJ Ex 65.

17 *Ajyodhya v. Shiv*, 97 IC 1019.

18 *Jebson v. E. & W. I. Dock Co.*, LR 10 CP 300 : (1874-80) All ER Rep 615.

19 *Bradburn v. G. W. Ry.*, LR 10 Ex 1 : (1874-80) All ER Rep 195.

20 *Karim v. Desi*, 31 ALJ 670; *Lurgadin v. Ram*, 1930 MB 15.

the debt has been received, a suit will not lie for the recovery of nominal damages¹. In an action for repayment of a debt, only nominal damages are given for non-payment within the stipulated time over and above interest and cost². Similarly, when a bill of exchange is dishonoured neither the acceptor nor any one else is liable to pay more than nominal damages, i.e., the amount of the bill and interest and expenses of noting and protest³. Damages sustained by expulsion from trade union is too remote and only nominal damages can be recovered⁴.

22. Bill of Exchange.—In a contract for sale of negotiable securities the measure of damages for breach is the difference between the contract price and the market price at the date of the breach. The seller is not bound to mitigate the damages by subsequent sale at better prices⁵. On failure to give delivery of shares, the purchaser after cancellation of the bargain may recover the money he has paid⁷.

23. Conversion by an agent.—An agent who engages in a fraudulent scheme to defraud his principal forfeits the right to indemnity in respect of transactions which form part of the fraud. Where securities deposited by the principal with the agent are fraudulently disposed of by the agent, the principal, on each occasion on which the shares were sold, has the right to damages for conversion⁸. In a suit by a principal against his agent for damages for wrongful conversion the principle underlying the grant of damages is that the court will, so far as money can do it, place the plaintiff in the same position in which he would have been in if the wrong charged had not been committed. There is no unalterable rule of the highest market value between the date of conversion or breach and date of the trial. The rule with regard to damages applicable to cases of ordinary merchandise would undoubtedly be different to the rule applicable to articles of special value, such as pictures, gems. Even with regard to ordinary merchandise the plaintiff should have a reasonable time to go into the market and purchase the requisite quantity⁹. In case of articles of common merchandise the state of the market subsequent to the sale would afford the criterion by which to fix the loss¹⁰. The material date would ordinarily be the date of conversion¹¹. The measure of damages for wrongful conversion of goods by a bailee against a stranger is the full value of the goods¹².

1 *Beaumont v. Greathead*, 15 LJ CP 130; see *Dicks v. Brooks*, 15 Ch D 22, 40; *Societe des Hotels v. Cummings*, (1922) 1 KB 451; (1921) All ER Rep 408.

3 *Joule v. Taylor*, 21 LJ Ex 31.

4 *Re Commercial Bank*, 30 Ch D 522; see illust. (b) and note thereon.

5 *Howard v. Odham's Press* (1938) 1 KB 1; (1937) 2 All ER 509.

6 *Jamal v. Moolla Dawood*, 43 IA 6; *Michael v. Hart*, (1902) 1 KB 482.

7 *S. B. de Banque v. Gudhari*, 1940 PC 90.

8 *Solloway v. Mc. Laughlin*, 1938 PC 23.

9 *Tadi Sarreddi v. Chelamcherla*, 55 MLJ 586; *Midland Bank v. Reckitt*, 1933 AC 1; (1932) All ER Rep 90.

10 *Manohubhai v. Tod*, 20 B 633.

11 *Motilal v. Lakshmi*, 1943 N 162.

12 *Turner v. Hardcastle*, 31 LJCP 193, 198.

24. **Charter-party agreements.**—Illust. (b) shows that although no loss is suffered because there is no change in the market rate the "plaintiff may still be entitled to compensation for the trouble and expense to which he is put in supplying himself with that which the defendant ought to have supplied him"¹³. Where there has been a change in the market rate the plaintiff will of course be entitled to recover the loss sustained by him. The plaintiff contracted with the defendants that they should be ready with their ships to receive a cargo of coal on a certain date. The defendants broke their contract and the consequence was that the plaintiff was obliged not only to charter a vessel at an advanced freight, but also to bring coal at a higher price the total difference in price amounting to £97 10s., held, he was entitled to recover that sum. It was contended that because the coal had risen in price it would have fetched more on resale, but no evidence having been given of the rise in price at the place of resale no inference could be drawn as suggested, and the plaintiff's claim as proved was awarded¹⁴.

25. **Voyages by sea.**—There can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. Whenever circumstances admit of calculation as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of sea voyage as of land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases. The case, *the Parana*¹⁵, does not establish that damages cannot be recovered for loss of market on voyage by sea¹⁶. Where time was of the essence of the contract and a guarantee was given that the vessel would sail on a particular date and relying on that guarantee passages were booked by that vessel but she failed to sail on that day, the plaintiff was justified in taking passage in another ship and entitled to recover from the defendant the deposit money and expenses of detention at port¹⁷.

26. **Indemnity.**—A complete indemnity against costs of actions includes costs as between solicitor and client¹⁸. On a covenant of indemnity a party may recover all those charges which necessarily and reasonably arise out of the circumstances under which the party became responsible, but not costs incurred in an action where the subject matter of the action had already been decided against the party in a previous suit¹⁹. Costs of action are recoverable where there is an indemnity against costs, even without notice²⁰.

27. **Substantial damages.**—In English law substantial damages are recoverable, as pointed out above, in the case of breaches of contracts to marry.

13 C. & S. 292.

14 *Featherston v. Wilkinson*, LR 8 Ex 122.

15 2 PD 118.

16 *Dunn v. Bucknall Bros.*, (1902) 2 KB 614, 622 : (1900-03) All ER Rep 131.

17 *Cranston v. Marshall*, 19 LJ Ex 340.

18 *Born v. Turner*, (1900) 2 Ch 211.

19 *Smith v. Howell*, 20 LJ Ex 377.

20 *Jones v. Williams*, 10 LJ Ex 120.

The only other case where such damages can be recovered on a breach of contract is from bankers who refuse to pay a trader's cheque when there are sufficient funds of the trader in the bank, if the refusal affects the credit of the customer¹. A person, not a trader, is not entitled to recover substantial damages for the wrongful dishonour of his cheque, unless special damage is proved to have been sustained².

28. Lease.—If it is known that the premises demised are taken for the purpose of a particular business, then if possession be not given at the time agreed upon, so that the business cannot be carried on, damages may be recovered in respect of the delay caused by the defendant's wilful refusal to perform his contract, and the measure of damages will be the profit the plaintiff would have made if possession had been given to him as stipulated³. Even in such a case there would be a duty cast upon the plaintiff to minimise the damages, if he could, but the burden of proving that the plaintiff had the means available and did not take steps to avail himself of the means will lie heavily on the defendant⁴. Where a lessee promises to pay rent to the superior landlord in discharge of the plaintiff's liability, the plaintiff is entitled to maintain an action in damages for the amount the moment the time expires within which the defendant is to pay⁵. For breach of a covenant to yield up in repair, brought after the determination of the term, the measure of damages will be the amount necessary to place the premises in good repair. For breach of a covenant to keep the demised premises in repair the measure of damages is the value of the lessor's liability to his superior landlord⁶. The measure of damages for the voluntary cancellation of a contract of lease is the money held as consideration for the lease and the money spent by the lessee over the property from the date of the lease, together with interest on the entire sum from the dates on which the payment and expenditure were made⁷. The proper measure of damages where a tenant holds over is twice the amount of rent payable by the tenant⁸. Where a tenant continues to occupy premises after receipt of notice of enhancement of rent, the enhanced rate can be recovered from him as damages for breach of contract⁹.

Where a contract is to pay rent in kind, a suit for breach of such contract is a suit to recover the money value of rent in kind, interest on such unliquidated damages is not payable¹⁰. When a contract gives a tenant an option to pay rent partly in paddy and partly in rice or altogether in money, the contract providing the rate in the latter case, the rent is payable at the

1 *Rolin v. Steward*, 23 LJ CP 148, fold in *Vanbergen v. St. Edmunds Properties*, (1933) 1 KB 223 : (1933) All ER Rep 488.

2 *Gibbons v. Westminster Bank*, (1939) 2 KB 882; *Jogendra v. N. B. Bank*, 1939 C 63; *Marzetti v. Williams*, 1 B & Ad 415 : (1824-34) All ER Rep 150.

3 *Jacques v. Millar*, 6 Ch D 153; *Amanchi v. Nama*, 37 MLJ 335, see authorities reld. to.

4 *Ma Hrin v. Chew*, 90 IC 635.

5 *Ratnessur v. Hurish*, 11 C 221.

6 *Ebbetts v. Conquest*, (1895) 2 Ch 377 : (1895-99) All ER Rep 622.

7 *Laxmanji v. Guta*, 109 IC 205 headnote

8 *Sundar v. Ram*, 1933 L 61.

9 *Madan v. Bohra*, 1934 A 115.

10 *Narayan v. Nagappa*, 12 Bom LR 831.

rate fixed by the contract and does not depend on the market rate of the paddy¹¹. If the rent be fixed partly in cash and partly in paddy and the price of paddy payable on default of payment in kind be also fixed, on a rise in the price of paddy, the landlord will not be entitled to the market price of paddy on the date of breach¹².

29. **Sale of land.**—Though the illustrations to the section refer mainly to breaches of contract with regard to movables, there is nothing in the wording of the section itself which would indicate that it is not applicable to contracts dealing with immovable property¹³. Damages are to be assessed on the same standard¹⁴. Thus damages arising on resale of immovable property are not recoverable where it is expressly stipulated between the parties that the only damages that a party will be entitled to on breach of any condition in a contract is the forfeiture of the deposit¹⁵. The measure of damages for breach of contract to sell immovable property is the difference between the contract price and the price at which it was ultimately sold to a third party¹⁶. The question is how much worse off is the vendor by reason of the loss of the purchase money in consequence of the non-performance of the contract¹⁷, in other words, the law in this country differs from the English law and allows damages the measure of which ordinarily is the difference between the contract price and the market price at the date of the breach¹⁸. The vendors are bound to minimise the loss¹⁹. When a vendor fails to complete a contract for sale of immovable property, the purchaser has two remedies open to him. He can (i) treat the contract as rescinded, and sue either in equity to be placed in the position he would have been in had it never been made, or sue at law for any money that he has parted with, or (ii) treat the contract on foot and (a) ask for damages for its breach, or (b) seek the remedy of specific performance²⁰.

The English law upon a breach of contract for sale and purchase of real estate, as laid down in *Flureau v. Thornhill*¹, and established by *Bain v. Fothergill*², is that a vendor of real estate acting in good faith is not liable to the purchaser in damages for the loss of bargain where he is unable

11 *Nilmadhab v. Sitanath*, 26 CLJ 94.

12 *Bangshiram v. Prasannamoyi*, 55 C 574.

13 *Jagar v. Musai*, 53 IC 889; *Ma Hnin v. Chew*, 90 IC 635; *Parmanand v. Ghulam*, 116 IC 449.

14 *Ranchhod v. Manmohandas*, 32 B 165.

15 *Municipal Board, Allahabad v. Tikandarjang*, 58 A 52.

16 *Radhakishan v. Shankar*, 100 IC 422.

17 *Mohanlal v. Chunnial*, 4 Bom LR 814.

18 *Akhtar v. Haq*, 78 IC 87; *Adikesavan v. Gurunatha*, 40 M 338; *Radhakishan v. Shankar*, 100 IC 422; *Ranchhod v. Manmohandas*, 32 B 165; *Vallabhdas v. Nagardas*, 23 Bom LR 1213; *Tukun v. Honuman*, 7 CWN 108.

19 *Motilal v. Jammadas*, 162 IC 944.

20 *Pratap v. Raghu*, 169 IC 887; see *Wallington v. Townsnes*, 1939 Ch 588: (1939) 2 All ER 225.

1 2 W. Bl 1078.

2 L.R. 7 H.L. 185.

to perform his contract owing to a defect of title³. Even the expenses of raising the purchase money are not recoverable⁴. But numerous exceptions have since been engrafted upon this rule. Thus ordinary damages for breach of contract have held to be recoverable if the seller had no title to the land at the date of the contract and failed to complete the sale at the time fixed for completion⁵, or where the delay has been caused by reason of the vendor not having taken reasonable pains to give the purchaser possession pursuant to the contract⁶. In an action for breach of an implied covenant of title the measure of damages is the difference between the purchase money and the value of the premises as conveyed, in other words, between the value of the property as purported to be conveyed and that which the vendor had power to convey⁷.

The English rule has been applied in one case⁸ in this country. In this case the vendor could not make out a good title, so the contract could not be completed in time, the plaintiff was held not entitled to recover damages for loss of the bargain. But it has since been pointed out that the Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities. It is not open to the court to reduce the real damages arising from the breach of contract on the part of the defendant by the introduction of consideration of expediency, or by an extension of the principle laid down in *Flureau v. Thornhill*⁹, to a case not within its purview¹⁰. As this section imposes no exception on the ordinary law as to damages, whatever the subject matter of the contract, in case of breach of a contract for sale of immovable property through inability on the vendor's part to make a good title, the damages must be assessed in the usual way, unless it can be shown that the parties expressly or impliedly contracted that the vendor would not be liable¹¹.

Vendee is not entitled to compensation when he knows that vendor is a minor¹². No question of damages arises for the non-performance of an

3 See *Lock v. Furze*, LR 1 CP 411, 454; *Compton v. Bagley*, (1892) 1 Ch 313, 321.

4 *Hanslip v. Padwick*, 19 LJ Ex 372; see *Hodges v. Litchfield*, 1 Bing NC 492; (1835-42) All ER Rep 551.

5 *Halkett v. Dudley*, (1907) 1 Ch 590; (1904-07) All ER Rep 465.

6 *Jones v. Gardiner*, (1907) 1 Ch 191; *Braybrooks v. Whaley*, (1919) 1 KB 435; *Engell v. Fitch*, LR 4 QB 659; *Day v. Singleton*, (1899) 2 Ch 320; see cases reld. to in *Nagardas v. Ahmedkhan*, 21 B 175.

7 *Turner v. Moon*, (1901) 2 Ch 825.

8 *Pitambar v. Cassibai*, 11 B 272.

9 2 WB 1 1078.

10 *Nagardas v. Ahmed Khan*, 21 B 175; *Ramsing v. Sajat*, 101 IC 704; *Adikesavan v. Gurunatha*, 40 M 338; *Nabin v. Krishna*, 38 C 458.

11 *Ramchod v. Manmohandas*, 32 B 175; *Jay Kishen v. Arya Priti Nidhi Sabha*, 1 Lah 380; *Adikesavan v. Gurunatha*, 40 M 338 FB; *Parmanand v. Ghulam*, 116 IC 449; *Sakharam v. Jaiaram*, 147 IC 1091; *Nabin v. Krishna*, 38 C 458; *Abdulali v. Gokul*, 97 IC 269; *Muhammad v. Ladha*, 85 IC 421; *Motilal v. Jamnadas*, 162 IC 944; *Sakha v. Jai*, 1933 N 263.

12 *Bechai v. Hayat*, 1940 O 119.

illegal contract¹³. A manager of a joint Hindu family who agrees to sell immovable property belonging to himself and the minor members of the family is personally liable under this section¹⁴. Where a contract of sale is executed and possession given, but the purchaser is evicted, he is entitled to recover from the vendor, who guarantees his title, the value of the land at the date of the eviction¹⁵. On purchase of immovable property the purchaser is entitled to claim compensation on actual dispossession¹⁶. Where a vendor knowingly or recklessly (though without intention to defraud) makes some material misrepresentation with respect to the property sold, so that he is unable to convey property answering to that which he contracts to sell, he is not entitled to rescind the contract under the rescission clause in the contract, but is liable to pay damages. An agreement to transfer non-transferable property is void and no damages are recoverable for its breach. But for breach of an agreement to convey what one has no authority to convey, and for breach of a guarantee for quiet enjoyment, damages are recoverable¹⁷. Where in consequence of a change of circumstances the defendant's breach of contract has not produced the full damage which the contract originally provided against, only the loss which has actually been incurred can be recovered¹⁸. Thus, where there is a defect in title, but the land is still in the possession of the plaintiff, the fair measure of damages will be to give to the plaintiff such compensation as will compensate him for the defective quality of his title. The question of the amount of compensation to be awarded is undoubtedly of some difficulty¹⁹. Where A enters into a contract with B for the purchase of B's house for Rs. 5,500 and A refuses to carry out the contract, the house is sold in execution of a decree obtained by one of A's creditors and realises Rs. 3,100, B is entitled to recover Rs. 2,400 from A²⁰. Where the owner refuses to part with his property after entering into a contract of sale thereof, he is to pay damages assessed on the difference between the contract price and the compensation allowed to the vendor by local government, by which the property was acquired, excluding however the allowance of 15 p. c. awarded by the government¹. The English rules have in some cases been followed. Thus it has been laid down that upon a contract for the sale of land, if the vendor without fraud is incapable of making a good title, he is not liable to pay any damages. But this rule does not apply where the vendor fails to free an encumbrance which is a cloud on the title². In several cases compensation has been awarded for material

13 *Kaleswar v. K. R. B. & Co.*, AIR 1969 SC 504.

14 *Adikesavan v. Gurunatha*, 40 M 338.

15 *Ramsing v. Sajan*, 101 IC 704; *Parmanand v. Ghulam*, 116 IC 449.

16 *Bhagwati v. Badri*, 1936 O 141.

17 *Vallabhadas v. Nagardas*, 23 Bom LR 1213; *Gulab v. Surya*, 1950 B 401, 52 Bom LR 614.

18 *Wigsell v. School for Blind*, 8 QBD 357.

19 *Harilal v. Mulchand*, 52 B 883; *Sundera v. Pandhari*, 1938 N 441.

20 *Mohanlal v. Chunilal*, 4 Bom LR 814.

1 *Nabin v. Krishna*, 38 C 458, fold in *Radha Kishan v. Sankar*, 100 IC 422.

2 *Nabin v. Krishna*, 38 C 458.

defect in title and not for material defect in the property³. But the latter may include the former⁴. There is however a difference between the two⁵.

Each case depends upon its own particular circumstances. Where a contract for the sale of immovable property was entered into at a time when undoubtedly there were difficulties in the owner obtaining possession of the land (which was leased to a tenant), and the difficulties were within the knowledge of both parties to the suit, on the plaintiff rescinding the contract for failure of the defendant to complete the contract within the time fixed, having regard to the circumstances of the case the plaintiff was entitled to the return of his deposit and the costs of investigating the title, and not to the extra profit that he might have made, if the original contract had been duly fulfilled, on resale of the property to a third party⁶. Where the vendor by his delay in answering the defendant's requisition contributes to the resulting loss he is only entitled to the costs on the agreement of sale and to the forfeiture of the earnest money⁷. A purchaser's cause of action arises when he is dispossessed or is compelled to pay money which he should not be compelled to pay⁸. A person who agrees to buy a house for another, to pay the purchase money and to pay a sum as damages in case of default is himself liable for the breach as the contract is made on his own behalf. The court is not bound to award the exact sum stipulated between the parties as damages. The measure of damages is the difference between the contract price and the value of the house at the date when the contract ought to have been performed⁹. Damages are not given simply for delay in completing a contract for sale, except where special damage has occurred *e.g.*, from deterioration in the meantime or from efflux of time in a short lease¹⁰. Ordinarily the remedies of a person who is injured by a breach of a contract of sale are these : He can either rescind the contract and sue for restitution to his former position, or he can affirm the contract and sue either for damages for the breach or for specific performance of the agreement¹¹.

30. Mortgage and Pledge.—In ordinary cases a mortgagee, when deprived of his security, can only recover his mortgage money as damages for breach of the covenant, yet where the mortgage deed contains a covenant not to pay off the mortgage for a term of 99 years the plaintiff is entitled to damages for being deprived of a favourable and long term investment¹². The

3 *Nawal v. Surju*, 54 A 774; *Narsing v. Chuttoo*, 50 C 614; *Harilal v. Mulchand*, 52 B 883; *Adikesavan v. Gurunatha*, 40 M 338; *Sundera v. Pandhari*, 1938 441.

4 *Haji Essa v. Dayabhai*, 20 B 522.

5 *Motilal v. Jamnadas*, 162 IC 944.

6 *Dhanrajgiriji v. Tata & Sons*, 49 B 1, distgd. in *Parma Nand v. Ghulam*, 116 IC 449; *Mangal v. Dial*, 1940 L 159.

7 *Shamsuddin v. Dayabhai*, 48 B 368.

8 *Arunugham v. Mariappan*, 1938 M 255.

9 *Lakshumanan v. Subramanian*, 50 IC 69, see illust. (c).

10 *Chinnock v. Ely*, 34 LJ Ch 399; 46 ER 1066 LC.

11 *Motilal v. Jamnadas*, 162 IC 944.

12 *Nagardas v. Ahmed Khan*, 21 B 175; *Parbati v. Durga*, 1949 P 487.

cause of action arises not from the fact of the existence of undisclosed encumbrances but from that of dispossession or actual payment of some money which should not have been paid¹³. A mortgagor who sues for redemption is entitled to interest on the surplus mortgage money that is found with the mortgagee after the satisfaction of his claim from the date of the institution of the suit¹⁴. In the case of mortgages the practice is that if there be no provision for payment of interest on default of repayment of the principal on the stipulated day the interest continues to run¹⁵. An equitable mortgage by deposit of title deeds carries interest upto the date of actual payment¹⁶. In a mortgage account in the absence of special agreement only simple interest and not compound interest can be charged¹⁷. For breach of an agreement to give security by way of mortgage for a loan, the lender is entitled to compensation the measure of which is the amount of advance with interest remaining due¹⁸. A contract to lend money on a mortgage does not create an obligation to pay money. But a breach of the contract may give rise to a claim for damages¹⁹. Where money has been left with a vendee or mortgagee in order to discharge some earlier mortgage debt and such vendee or mortgagee fails to discharge the liability, a cause of action for damages arises immediately and the vendor or mortgagor need not wait until the property is actually sold or until he is sued before bringing a suit for damages²⁰. If the notice to sell given by a pawnee be not proper, the pawnee becomes liable in damages to the pawnor. The measure of damages is the loss which the pawnor has actually sustained taking into account the pawnor's interest in the goods at the time of the conversion¹.

31. Paragraph III.—The paragraph speaks of an obligation resembling that created by a contract and not necessarily a completed contract. Where compensation is payable under the Land Acquisition Act to A, the legal representative of C, but it is paid by mistake to B, the obligation on B to repay the amount is one resembling that created by a contract, and B is bound to refund the amount to A².

32. Explanation.—"In assessing the damages for breach of performance, the court will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or would have been diminished"³, i.e., to have the damages suffered through breach of contract minimised.

¹³ *Arumugham v. Mariappan*, 1938 M 255.

¹⁴ *Haji Abdul v. Haji Noor*, 16 B 141.

¹⁵ *Price v. G. W. Ry.*, 16 LJ Ex 87; see *Morgan v. Jones*, 22 LJ Ex 232.

¹⁶ *Fitzgerald's Trustee v. Mellersh* (1892) 1 Ch 385; (1891-94) All ER Rep 979.

¹⁷ *Daniell v. Sinclair*, 6 AC 181; 44 LT 257.

¹⁸ *Jaidayal Ram*, 17 C 432.

¹⁹ *Hiralal v. Khizar*, 161 IC 251.

²⁰ *Abdul v. Abdul*, 34 ALJ 940, see cases reld. to; *Jadu v. Jamuna*, 1946 P 263; *Mohammad v. M.*, 1939 A 289; *Mohantal v. Moti*, 1935 N 135.

¹ *Cooverji v. Mawji*, 38 Bom LR 982.

² *Anrudh Kumar v. Lachhmi Chand*, 50 A 818.

³ *Frost v. Knight*, LR 7 Ex 111, 115; (1861-73) All ER Rep 221.

This principle of English law is recognised in the Explanation⁴. Thus, a buyer of goods is not entitled to recover from the seller damages arising from depreciation in the value of the goods owing to his retaining them in his possession for some length of time instead of forthwith selling them⁵. In other words, damages recoverable are to be diminished by the amount affected by the conduct of the plaintiff or his agent⁶. The burden is upon the plaintiff to prove that he has taken all reasonable steps to mitigate damages⁷.

Where plaintiff claimed damages for default in building a wall which the defendant had agreed to build, *held*, the plaintiff was entitled to damages, but this must be based on what the damages were within a reasonable period of the breach of the contract. Compensation under the section is not to be given for any remote and indirect loss or damage sustained by reason of the breach of the contract⁸. Nor can the consignor of goods claim damages for delay in delivery where the delay is partly due to his own unjustifiable conduct. The general rule as regards the extent of carrier's liability is thus laid down. "Generally speaking, when a carrier fails to deliver articles of merchandise in the ordinary course, and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold, if they had been carried according to the contract, and their marketable value at the earliest period at which they could have been brought to the market, after the delivery to the consignee, will be the measure of damages recoverable"⁹. In order to minimise damages a buyer is not bound to force the sub-purchaser to take and pay for the goods¹⁰.

The Privy Council have pointed out that the Explanation is in accordance with the decisions in *Dunkirk Colliery v. Lever*¹¹, and in *British Westinghouse etc. v. Underground Electric Railways Co*¹². It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach, he cannot claim as damages any sum which is due to his own neglect to take such steps. The loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it¹³.

The first principle on which damages in cases of breach of contract are calculated is that, as far as possible, he who has proved a breach of a

⁴ *Karim v. Deh*, 150 IC 460; *Aliya v. Mohini*, 1943 O 17.

⁵ *Waddell v. Blockey*, 4 QBD 678.

⁶ *Wilson v. Hicks*, 26 LJ Ex 242.

⁷ *M. Nanjappa v. M. P. Muthuswamy*, AIR 1975 Knt 146, 149.

⁸ *Ram Kuar v. Shankar*, 108 IC 433.

⁹ *Arjundas v. Secretary of State*, 85 IC 786.

¹⁰ *Finlay Co. v. Kwik Hoo*, (1929) 1 KB 400; (1928) All ER Rep 110 CA, see conflicting decisions *referred to*.

¹¹ 9 Ch D 20, 25.

¹² 1912 AC 673, 689.

¹³ *Jamal v. Maolla Dawood*, 43 LA 6, 10; *Ghulam v. Iabal*, 1939 T. 112. *Pharmaceuticals v. Eddip*, 1940 P 38.

bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damages which is due to his neglect to take such steps. These two principles also follow from the law as laid down in S. 73 read with the explanation thereof¹⁴.

Where plaintiffs could have taken delivery of goods at an earlier date but instead of doing so they allowed the goods to go from bad to worse, so that they became unsaleable when they were actually ordered by the plaintiffs to be sold, the plaintiffs certainly failed to do what they might have done to remedy the inconvenience¹⁵. Where a plaintiff took a shop on lease, paid an advance, but the defendant could not give him possession, and the plaintiff chose to do no business for 8 months though there were other shops available in the vicinity, he was entitled only to a refund of his advance as his duty was to minimise damages¹⁶.

33. Actions for damages.—A cause of action for breach of contract, can only arise as and when the plaintiff has actually suffered damage¹⁷. Where plaintiff has already recovered damages in respect of the same cause of action in a suit, in which he could have recovered damages for loss subsequently arising, a fresh suit for the recovery of the latter is not maintainable¹⁸. In case of a continuing breach, however, damages recovered in a former action are no bar to a fresh action¹⁹. Recovery of judgment in a suit for the recovery of the price of work alleged to have been improperly done is no bar to an action for damages for the nonperformance or improper performance of the work²⁰. In case of a breach of contract all parties who are damnified by the breach must join in the suit¹, but not if the action be for damages for wrong independent of the contract². A defendant in a suit for breach of contract is entitled to know exactly the case he has to meet³. A suit is maintainable although it combines a claim for damages against one defendant and for wrongful detention of goods against another, both claims being covered by the two parts of the section⁴. A court passing

14 *Murlidhar v. Harishchandra*, AIR 1962 SC 366, 369. See also *British Westinghouse etc. Co. v. Underground Electric Railway Co.*, (1912) AC 673, 689 : (1911-13) All ER Rep 63.

15 *Commissioners, Port of Rangoon v. Moolla Dawood*, 9 IC 470.

16 *Neki v. Pirbhu*, 100 IC 662.

17 *Karim v. Debi*, 150 IC 460 ; *Jado v. Jamuna*, 1946 P 263.

18 *Gibbs v. Cruikshank*, LR 8 CP 454 ; *Re Sneyd*, 25 Ch D 338.

19 *Coward v. Gregory*, LR 2 CP 153 ; *Child v. Stenning*, 11 Ch D 82 ; *Henderson v. Thorn*, (1893) 2 QB 164.

20 *Davis v. Hedges*, LR 6 QB 687, *Mondel v. Steel*, 8 M&W 858 : (1835-42) All ER Rep 511 fold.

1 *Ram v. Raghu*, 1 CLJ 496.

2 *Fatik v. Atlas*, 15 CLJ 225.

3 *Jamshed v. Kunji*, 1938 N 530.

4 *Ram v. Sarwar*, 94 IC 999.

a decree for money upon a plaint, which on the face of it sets up as its cause of action the breach of a contract which is void in law, acts illegally in the exercise of its jurisdiction⁵. A suit for mesne profits is not a suit for damages⁶. Where the plaintiff's breach of obligations under the contract leads to the termination of the contract by the defendant, the plaintiff's claim for damages must be dismissed as the termination is not wrongful⁷.

34. Discretion of Appeal Court.—The Privy Council have observed that their Lordships "would never think of interfering with a measure of damages which had been fixed by a learned judge unless they saw that there was something very clearly wrong with the figure he had fixed upon"⁸, or there has been no exercise of judicial discretion at all⁹. The question of damages is not one which is normally to be considered in a second appeal¹⁰.

35. Proof.—In a suit for the recovery of damages for breach of contract it is for the plaintiff to establish the contract, the breach of contract¹¹, as also the extent of his suffering¹². The plaintiff must give the best evidence to prove damages, otherwise every presumption would be made against him, but this does not relieve the court altogether of the duty of assessing the damages as best as it can on the evidence and materials actually before it¹³. Where a contract imposes mutual obligations on the parties, it is for the party suing for damages for breach to show that on the date fixed for performance of the contract he was ready and willing to perform his part of the bargain¹⁴. Where under a contract goods were delivered in Calcutta by the vendors who knew that they were intended for export and after a searching examination by the purchaser were ultimately sent to America where delivery was refused on the ground that the goods were not of the contract quality, *held*, the burden of proof lay on the purchaser who accepted the goods after full examination in Calcutta to rebut the presumption of due performance and of the breach of contract by the vendors¹⁵. Oral evidence of the due date specified in a contract is admissible if it is absolutely repugnant to the express terms of a contract¹⁶.

No plaintiff can maintain an action for breach of contract unless he can aver and prove that he has performed or has at all times been ready to perform his part of the contract¹⁷. To entitle the plaintiff to succeed in a suit to recover damages for procuring a breach of contract, the plaintiff must establish not merely that the defendant procured the other defendants

5 *Rabi v. Dharamraj*, 15 IC 35 *Alston v. Pitambar*, 25 A 509 *reld. to*.

6 *Kordatu v. Vuppala*, 1935 M 307.

7 *G. L. Kilikar v. State of Kerala* AIR 1971 SC 1196.

8 *Skipp v. Kelley*, 94 IC 331 PC; *Halubasia v. Rup Kishore*, 62 IC 72

9 *Kunbha v. Motichand*, 39 IC 121.

10 *Fonesca v. Anand*, 154 IC 320.

11 *Lakurka Coal v. Jumnadas*, 33 IC 838.

12 *Keshav v. Gandi*, 29 IC 952.

13 *Joseph v. Shewbux*, 29 CLJ 348 PC.

14 *Mohamad v. Hasan*, 67 IC 602.

15 *Gan Kilm v. Rally Bros.*, 13 C 237 PC.

16 *Goverdhandas v. Rowji*, 76 IC 62.

17 *Tips v. State of Johore*, 163 IC 417 PC.

to commit a breach of contract but that he did so knowing that there was a contract. Malice is an essential ingredient¹⁸.

36. Interest.—The words 'loss or damage' include interest which a party to a contract has to pay to a stranger as part of the compensation¹⁹. In the absence of an agreement and a demand in writing interest cannot be awarded upon sums which are not payable under a written instrument and of which payment has been illegally delayed²⁰. This law has not been altered by the subsequent enactment of the Contract Act. No doubt illustration (n) of the section applies to and includes cases of breaches of contract to pay money, but to construe the section as giving a right to interest even in those cases in which it could not be awarded under the provisions of the Interest Act, 32 of 1839, would be to hold that the latter enactment was virtually repealed by the former. Where therefore the provisions of the Interest Act have not been complied with and no agreement or usage giving a right to interest is alleged, the plaintiff is not entitled to a decree for interest on equitable or other grounds¹. Thus, where a sale fell through, interest was allowed on the purchase money from the date of demand². Interest can be allowed only under a contract express or implied between the parties or when the requirements of the Interest Act have been satisfied. Interest cannot be claimed by way of damages where there is no contract for the payment of money on a specified date³. Interest can be recovered on an equitable mortgage⁴, or on a legal mortgage in lieu of notice on failure by the mortgagor to repay on due date⁵. Interest on damages after date of notice upto the date of judgment has been allowed⁶. Interest has been decreed on arrears of rent due from a lessee⁷. Even though the claim of the plaintiff is limited to interest which is not recoverable either under any contract or under the provisions of the Interest Act it is open to the court to award the amount of interest as damages for wrongful detention⁸.

18 *Pandurang v. Nagu*, 30 B. 598, see the elaborate discussion as to law regarding procuring a breach of contract in *Khimji v. Narsi*, 39B. 682; *Jekisondas v. Ranchoddas*, 41 B 137; *Ramalinga v. Muthuswami*, 51 MLJ 765.

19 *Bishambhar v. Jagprasad*, 146 IC 804; *Tripathi v. Jag*, 1933 A 455.

20 *Kisara v. Cripati*, 1 MHR 396; see *Subramania v. Subramania*, 18 MLJ 245.

1 *Kamalammal v. Peeru Meera*, 20 M 481; *Jwala Prasad v. Hoti Lal*, 46 A 623; *Ismail v. Mehdi*, 46 A 897. Interest by way of damages is not recoverable for the mere wrongful detention of a debt *Prosonnomoyi v. Gopal*, 31 CJ 348; *Sheikh Mehtab v. Dharam*, 1944 N 330; *Ralli Bros. v. Bhagwan*, 1945 L 35.

2 *Alice v. Chard*, 25 Bom. LR 837.

3 *Nandram v. Gokal*, 149 IC 688; *Palahari v. Gajapathi*, 1933 M 729; *Gopal v. Municipality*, 1948 S 1; *M. C. G. v. Prabhu*, 1933 L 556; *Kalyan v. Looohmi*, 1951 Raj 11 (see Sale of Goods Act s. 61).

4 *Re Kerr's Policy*, LR 8 Eq 331.

5 *Smith v. Smith*, (1891) 3 Ch 550.

6 *Matilal v. Ram*, 64 CLJ 308; *Abdul v. Aziz*, 1933 O 259.

7 *Ghanasham v. Daulat*, 18 A 240; provisions of the Interest Act not considered.

8 *Saunadanappa v. Shivbasawa*, 31 B 354, 359; *Lala Chajmal v. Brijbhukhan Lal*, 22 IA 199; *Mansab Ali v. Gulab*, 10 A 85; *Jogeshur v. Ghanasham*, 5 CWN 356; *Gudri Koer v. Bhubaneswari*, 19 C 19; *Moti Singh v. Ramohari*, 24 C 699, *reft. to in Mohaniya v. Ram Khelawan*, 15 CLJ 684.

Illustration (n), it has been observed, is not exhaustive and cannot be considered as co-extensive with the provisions of the section itself; in other words, interest can be allowed on equitable grounds even if the case does not fall within the statutory enactment⁹. On the other hand, it has been pointed out that the section being declaratory of the English common law as to damages, the section cannot be deemed to abrogate the rule of common law as regards the award of damages. Under the common law, which is now well settled in England, interest cannot be awarded as damages for the mere wrongful detention of money. This means that, where it is shown that the nonpayment of money due is itself the breach of contract, and nothing else is proved to make out the claim for compensation for such breach, no interest can be awarded in addition to the recovery of the money withheld. But if adequate proof is given that, by reason of the breach of contract, special loss or damages was sustained by plaintiff for which the mere repayment of the amount due under the contract would not be an adequate compensation, and that the proper measure of damages awardable should include a reasonable rate of interest also on account of the loss proved to have been sustained, the court can award interest as part of the damages, either under illustration (n) or illustration (r). If the awarding of interest is deemed to be giving a remote damage, then such a relief will not be given under the section¹⁰. The question whether in the absence of any demand or any stipulation as to interest, interest can be claimed by way of damages for the period between the date of breach and date of suit on money advanced for the supply of goods at specified times has been elaborately discussed with reference to authorities in the Full Bench case in *Kandappa v. Muthuswami*¹¹, where it has been held by the majority that interest on the advance by way of damages cannot be recovered. Unless the matter can be brought under the Interest Act, or within the proviso, there is no warranty under the section for awarding interest for the mere detention of money after the date stipulated for repayment¹², or unless the contract is a special one e.g., where the defendants are bound to honour the drafts of the plaintiff, the plaintiff is entitled to substantial damages for breach of the contract¹³. In spite of the divergence of judicial opinion, the Calcutta High Court has held that, in a proper case, interest could be awarded by way of damages in the case of detention of a debt¹⁴. The Rangoon High Court adopted this view¹⁵, which went to the length of awarding compound interest. In a suit interest can be given either by way of damages

9 *Abdul v. Hamida*, 42 M 661; *Anrudh v. Lachhmi Chand*, 50 A 818; *Sheorani v. Gouri*, 95 IC 175; *Abdul v. Mohammad*, 30 ALJ 733; *Bishambhar v. Jag*, 31 ALJ 963.

10 *Rajaram v. Krishna*, 57 M 205; see *Lalman v. Chintanmani*, 41 A 254.

11 50 M 94; see *Nanchappa v. Ittichathara*, 53 M 549; *Ramalinga v. Muthuswami*, 51 MLJ 765; *Nandram v. Gokal*, 149 IC 688; *Chetty v. Chetty*, 1934 M 503; *Masood v. Baikan*, 1941 P 6.

12 *Pattinson v. Bindhya*, 146 IC 56; *Navnitdas v. Mancharsa*, 148 IC 822; *Gulab v. Mul Chand*, 101 IC 57; *Dist. Board v. Bulchand*; 1942 S 165; *Dist. Council v. Anna*, 1941 N 273.

13 *Larois v. Gurety*, LR 5 PC 346.

14 *Shiva v. Prayag*, 61 C 711.

15 *Mathu v. Annamalai*, 1936 Rang 141.

or under some statute or because it is a matter of contract.¹ Where in a suit for damages for breach of contract it is not a matter of contract and the right is not given under the statute, it is wrong to give damages upon damages². The decision that interest can be given by way of damages for detention of money even if, on a construction of the instrument, no interest is payable, as laid down by the Privy Council in *Chajmal v. Brij Bhukan*³, has lost its force in view of the later decision of the Privy Council in *B. N. Ry. Co. v. Ratanji*⁴, which says that interest cannot be paid unless there is a stipulation, express or implied, to pay interest. This decision sets at rest the conflict on the point which was prevalent in the judgments of various High Courts⁵. An agent is not liable to pay interest on money lying in his hands and belonging to the principal in the absence of an express agreement or of some mercantile usage⁶. No interest is chargeable under the Interest Act or as damages under the section in a balance of account between the plaintiff and the defendant which makes no mention of interest when notice has not been given that interest would be charged⁷. A creditor not entitled to any interest under the Interest Act is not debarred from claiming interest by way of damages⁸. Interest is not claimable as of right on the price of goods in the absence of specific agreement or mercantile usage⁹. Mercantile dealings however generally carry interest⁴. Interest subsequent to suit is entirely a matter within the jurisdiction of the court⁴.

Substantial damages are not allowed to be recovered in English law for non-payment of money on the stipulated day⁶. Interest has not been allowed upon the arrears of annuity in the absence of special circumstances⁷, or under a mortgage deed which contains no provision for interest⁸. In a suit for the recovery of a certain sum for the use and occupation of immovable property interest is not payable on the sum⁹. Interest on mesne profits from the date of institution of suit has been awarded¹⁰. Interest has been allowed on the refund of money deposited in court and wrongly withdrawn by a

6 *Arjuns v. Harakchand*, 172 IC 812.

7 17 A 511.

8 (1938) 2 Cal 72, see post; *Chaudhury v. Chaudhury*, 1945 P 196.

9 *Nirupama v. Anath*, (1938) 2 Cal 590, 597; *Shiva v. Prayag*, 1935 C 39; *Ramimedi v. Muthangi*, 194 2 M 429; *Shiva v. Siris*, 22 Pat 220

10 *Lalman v. Chintamani*, 41 A 254.

1 *Ranjit v. Karim*, 68 IC 678.

2 *Surja v. Pratap*, 26 C 955, refd. to in *Prosonnomoyi v. Gopal*, 31 CLJ 348.

3 *Deolal v. Tularam*, 109 IC 785.

4 *Rowther v. Vencata*, 14 IC 573.

5 *Hakim v. Ganga*, 1942 PC 61.

6 *Wallis v. Smith*, 21 Ch D 243, 275; *Graham v. Campbell*, 7 Ch D 490 : 47 LJ Ch 593 : 38 LT 195.

7 *Re Powell's Trust*, 10 Hare 134.

8 *Thompson v. Drew*, 20 Beav 49.

9 *Muhammad v. Dy. Commissioner, Bahraich*, 9 IC 221. Interest on rent allowed in *Udit v. Rampal*, 2 IC 920, per contra *Narayan v. Nagappa*, 8 IC 411. Interest allowed because lease provided for it, *Kifayat v. Protap*, 21 IC 82.

10 *Hurroppersaud v. Shamapersaud*, 3 C 654, but the rate is in the discretion of the court, *Panna v. Nihal*, 24 Bom LR 971 PC.

party¹¹, or on the unpaid balance of consideration money in case of sale or acquisition of land¹². On a sale falling through, interest was allowed on the purchase money advanced from the date of demand¹³. The liability for interest on a promissory note payable on demand arises from the date of the note¹⁴. Where the principal sum becomes barred by statute the claim for interest, in the absence of an independent contract to pay the interest¹⁵, becomes barred as the claim is only accessory to the principal¹⁶.

Money lying in current account with a bank is a loan and does not carry interest¹⁷. Interest will not be allowed by way of damages for delay where the party claiming it is himself guilty of delay¹⁸. The award of interest on the amount of damages from the date of breach of contract is illegal¹⁹. A mortgagee is entitled to claim interest up to the date of the decree if not barred²⁰, but not as a matter of course to interest at the contractual rate up to the date of payment¹. The court has power to give interest after suit². On the question of interest Their Lordships of the Judicial Committee have thus observed : Interest for the period prior to the date of the suit may be awarded if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law, *e.g.*, the Negotiable Instruments Act, S. 80. Under the Interest Act, the court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at certain time by virtue of a written instrument or when the circumstances are such that a court of equity would allow interest. There is a considerable divergence of judicial opinion in India on the question whether interest can be recovered as damages under this section where it is not recoverable under the Interest Act. Illustration (n) does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that upon breach of a contract to repay a loan on a specified date, interest may be recovered but not remote damages. The illustration, however, does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of law. Nor can an illustration have

11 *Collector of Ahmedabad v. Lavji*, 13 Bom LR 259.

12 *Ratanlal v. Municipal Commissioners. Bombay*, 21 Bom LR 114, 129 PC, cited in *Pandurang v. Mahadeo*, 23 Bom LR 1000.

13 *Alice v. Chard*, 25 Bom LR 837.

14 *Framroz v. Mahomed*, 28 Bom LR 141.

15 *Cheang Thye v. Lam Kin*, 1929 AC 670.

16 *Elder v. Northcott*, (1930) 2 Ch 422 : (1930) All ER Rep 398.

17 *Joachimson v. Swiss Bank*, (1921) 3 KB 110 : (1921) All ER Rep 92.

* 18 *Edwards v. Warden*, 1 AC 281, 294.

19 *Kayutu v. Narasinha*, 26 IC 429.

20 *Daudbhai v. Daudbhai*, 14 B 113.

1 *Balwant v. Gayan*, 35 A 534.

2 *Chatrabhuj v. Ambarsing*, 55 B 657, see S 34, CPC.

the effect modifying the language of the section which alone forms the enactment³.

Interest for a period prior to the commencement of suit is claimable either under an agreement or usage of trade or under a statutory provision or under the Interest Act, for a sum certain where notice is given. Interest is also awarded in some cases by courts of equity⁴. It is well settled that interest as damages cannot be awarded. Interest up to date of suit, therefore, is not claimable. As regards interest *pendente lite* until the date of realisation, such interest is within the discretion of the court⁵.

74. Compensation for breach of contract where penalty stipulated for—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with the Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

3 *B. N. Ry. v. Ratanji*, (1938) 2 Cal 72; see *ante*.

4 *Bengal Nagpur Railway v. Ruttanji Ramji*, AIR 1938 PC 67 : 65 IA 66.

5 *Mahabir v. Durga*, AIR 1961 SC, 990, 993.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

1. **Amendment.**—The section has been amended by Act VI of 1899 which added certain words to the section and illustrations [(d), (e), (f), and (g)] as also the Explanation. Previous to the amendment the first paragraph of the section ran as follows: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named."

The Amendment Act came into force on the 1st of May 1899 and applied to "every contract in respect of which any suit is instituted, or which is put in issue in any suit" after that date. There has been a conflict of decision as to the meaning of these words. They have been construed on the one hand to comprise two cases, namely, (i) the case of any contract in respect of which any suit may be instituted after the commencement of the Act; and (ii) the case of any contract which is put in issue in any suit after the commencement of the Act though the suit may have been instituted before the Act⁶. On the other hand, it has been held that the Act of 1899 only applies to suits instituted after the commencement of that Act⁷.

2. **The section.**—The section, prior to the amendment, did away with the distinction between a penalty and liquidated damages⁸. The terms of the section were broad enough to include the cases of liquidated damages and penalty and a wide discretion was given to the courts in the assessment of damages even in cases where the parties to the contract had, in anticipation of the breach, expressly determined by agreement what should be the sum payable as damages for the breach. The section was introduced to

⁶ *Brij Bhukhan v. Samiuddin*, 25 A 169.

⁷ *Sankaranarayana v. Sankaranarayana*, 25 M 343.

⁸ *Dilber v. Joyari*, 3 CWN 43; *Natesa v. Appan*, 33 M 375, on app. 38 M 178.

obviate difficulties which existed in distinguishing liquidated damages from penalty in English law; the effect of it was that the courts were not bound to award the entire amount of damages agreed upon by the parties in anticipation of the breach. The only restriction was that the court could not decree damages exceeding the amount previously agreed upon by the parties⁹. Accordingly, a plaintiff was not entitled to recover *simpliciter* the sum mentioned in the contract whether as penalty or as liquidated damages. He must prove the damages he had suffered and would be entitled to the amount he succeeded in actually proving not exceeding the sum mentioned¹⁰. But this simplicity of the law was disturbed by the practice of the courts in giving relief in certain cases by invoking their equitable jurisdiction (see below). The Amendment Act was passed with a view to bringing these cases within the scope and operation of the section, at the same time interfering as little as possible with its letter and spirit. It is a mistake to think that the section only speaks of agreements that are unreasonable, it speaks of all agreements in which the damages to be paid for breach of contract are stated as a certain sum of money or are otherwise specified. The effect of such a stipulation is that the damages awarded cannot exceed the sum of money or other matters specified, but, on the other hand, can exceed the actual damages or loss proved¹¹. The section is as much applicable to consent decree as to any contracts¹². With regard to the section the following is the intention of the legislature: (i) the plaintiff must prove his damage in a general sense; (ii) the contract made by the parties estimating their damages is in itself evidence; (iii) if there is no other evidence of damage this evidence alone will be considered sufficient in certain cases¹³; (iv) the sum named is not conclusive evidence, *i.e.*, if there be other evidence or circumstances showing that it is excessive, the court will not consider itself bound by it; (v) if, on the other hand, the evidence and circumstances indicate that the damage equals or may equal or is likely to exceed the amount named, the court will abide by it; and (vi) in case where other evidence shows that it is unreasonable, the plaintiff will have to prove his damages irrespective of the figure¹⁴. The section applies only to cases where the plaintiff omits to prove that he has sustained any actual loss or damage at all¹⁵. Even where liquidated damages are entered in a contract itself as payable in the event of breach, then the damages payable, when a breach occurs, are to be assessed in the ordinary way subject to the fixed amount as a maximum. It is for the plaintiff to prove the exact amount of damages

9 *Nait Ram v. Shib*, 5 A 238; see *Dharendra v. Altafur*, 62 IC 759; *Shambhu v. S. of S.*, 1940 S 1.

10 *Bhai Panna v. Bhai Arjan*, 33 CWN 949; PC; *Shahabuddin v. Vilayat*, 95 IC 614.

11 *Jagannath v. Vishnu*, 96 IC 382.

12 *Ahmed v. Amin*, 1946 S 150; *Hiralal v. Durga*, 1937 N 413.

13 The Privy Council in *Bhai Panna v. Bhai Arjan*, 33 CWN 949 did not exclude such a possibility.

14 *Mahadeo v. Siemens*, 60 C 1379, the language of the section criticised.

15 *Ajodhya v. Shio*, 97 IC 1019.

which he has suffered and that amount only can be awarded¹⁶. The section applies, as stated therein, when a contract has been broken. If a contract for sale provides for alternative modes whereby a purchaser may pay either by instalments or by a lump sum, it may be a question whether there is any breach until the purchaser has wholly failed to pay and not merely failed to pay in one mode¹⁷.

Both Sections 73 and 74 provide for reasonable compensation, and Section 74 contemplates that the maximum reasonable compensation may be the amount which may be named in the contract. Therefore, where in a case the arbitrators awarded the maximum amount so named and nothing more, their award could not be said to be bad on the face of it or against the law of India as contained in these sections of the Indian Contract Act¹⁸.

Section 74 of the Indian Contract Act is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties : a stipulation in a contract *in terrorem* is a penalty and the court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

Jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated ; but compensation has to be reasonable, and that imposes upon the court a duty to award compensation according to settled principles. The section does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted.

S. 74 applies not only to cases where the aggrieved party is seeking to receive some amount on breach of contract but also to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture the court has jurisdiction to award such sum only as it considers reasonable but not exceeding the amount specified in the contract as liable to forfeiture. An amount deposited by the contractor as security for due performance of contract for supply of goods is not earnest money ; hence the court can give relief to the contractor under this section in case of default. If the promisee sustains no loss by reason of the

16 *Acharaj v. Sant Singh*, 156 IC 146 ; *Dies v. B.I.M.F. Corp.*, (1939) 1 KB 724 ; *Rameshwarlal v. Balabrese*, AIR 1974 Raj 158.

17 *Raghavan v. Arumugham*, 68 MLJ 283.

18 *Shiva Jute Baling Ltd. v. Hindley & Co. Ltd.*, AIR 1959 SC 1357.

promisor's default the promisor can recover the entire amount deposited by him in spite of his failure to perform the contract¹⁹.

The words "to be paid" which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression "if the contract contains any other stipulation by way of penalty" widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid.

The application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section merely declares the law that, notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstances of the party in default being a plaintiff or a defendant in a suit. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach²⁰.

3. Penalty and liquidated damages.—Penalty is a liability agreed to by the parties to be imposed as a punishment on the party committing a breach of the contract. To constitute a penalty it would appear only necessary to establish the element of punishment, however well deserved and temperate such punishment might be¹. The word "penalty" can be used only if failure to comply with the condition puts a person in a worse position than he would have been if there had been no agreement at all and makes him liable to pay a large sum than that to which he would otherwise have been liable². It is a secondary stipulation which places an additional burden on default³. Where a condition in a contract carries with it an element of punishment it is in the nature of a penalty⁴. A penal provision is not restricted to money, increased interest or the like, but is wide enough to include any other stipulation by way of penalty, e.g., a stipulation to convey property in default of the payment of a debt on a fixed date⁵. A condition of forfeiture in a contract carrying with it an element of punishment is in the nature of penalty⁶. A stipulation in a contract introduced

19 *Maula Bux v. Union of India*, AIR 1970 SC 1955, 1958.

20 *Fateh Chand v. Balkishan Dass*, AIR 1963 SC 1405, 1410, 1411, 1412

1 *Narendra v. Oudh, Commercial Bank*, 30 IC 323; *V. Narasimha Rao v. Supdt. of Excise*, AIR 1974 AP 157.

2 *Ko Kyan v. U. Ba*, 159 IC 801.

3 *Kanteti v. Neti*, 1934 M 31.

4 *Munshi v. Ahmad*, 1933 O 291.

5 *Rajah of Ramnad v. Sellachami*, 34 IC 500; *Mahadeo v. Sant*, 57 IC 513.

6 *Munshi v. Ahmad*, 144 IC 756.

solely for securing the performance of the contract is penal'. In judging whether an agreement is penal or not, the court has to decide whether the terms are unreasonable as a whole and whether in fact they are so unreasonable that the parties never contemplated that they should receive effect⁷. It is therefore necessary to ascertain the intention of the parties⁸. A sum fixed by the parties will not be regarded as penalty simply because it is enormous⁹. What may be considered as a penalty in an ordinary contract may not be so in a contract of insurance¹¹.

Although the distinction between penalty and liquidated damages has been said to depend upon the intention of the parties and the construction of the document, yet the following rules may be of assistance :

(1) Where the contract contains a variety of stipulations of different degrees of importance and one large sum is stated at the end to be paid on breach of performance of any one of them, that must be considered as a penalty¹². When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification. Where a sum is made payable by a contract to secure the performance of several stipulations, the damages for the breach of which respectively must be substantially different, or in other words, to secure the performance of stipulations of varying degrees of importance, that sum is *prima facie* to be regarded as a penalty and not as liquidated damages¹³.

(2) That a very large sum should become immediately payable in consequence of non-payment of a very small sum, and that the former should not be considered as penalty, appears to be a contradiction in terms¹⁴.

(3) Where there is one event¹⁵ on which money is to be paid on breach of a contract, or the payment is agreed to be made for breaches (of any one of several events) which are of an uncertain nature and amount¹⁶, and there are no means of adequately ascertaining the damages, the money should be taken to be liquidated damages, unless the amount fixed is so large that

7 *Hiralal v. Durga*, 1937 N 413.

8 *Vaithinatha v. Govinda*, 42 ML 551, 557, followed in *Subbiah v. Muthia*, 65 MLJ 302.

9 *Reynolds v. Bridge*, 26 LJQB 12.

10 *Astley v. Weldon*, 2 B&P 346 : (1775-1802) All ER Rep 606.

11 *Sankuni v. E.I.L. Assce.*, 1932 M 241.

12 *Magee v. Lavell*, LR 9 CP 107, 111; *Elphinstone v. Monkland I & C. Co.*, 11 AC 332, 342.

13 *Willson v. Love*, (1896) 1 QB 626 : (1895-99) All ER Rep 325; *Elphinstone v. Monkland I. & C. Co.*, 11 AC 332, 342 cited.

14 *Kemble v. Farren*, 6 Bing 141 : (1824-34) All ER Rep 641; see *Wallis v. Smith*, 21 Ch D 243; *Pratap v. Raghu*, 1937 N 243; *Rama v. Saptha*, 1943 M 598.

15 *Saintier v. Ferguson*, 18 LJCP 217; *Law v. Local Board of Redditch*, (1892) 1 QB 127; *Astley v. Weldon*, 2 Bos & P 353 : (1775-1802) All ER Rep 606.

16 *Kemble v. Farren*, 6 Bing 141 : (1824-34) All ER Rep 641; see *Wallis v. Smith*, 21 Ch D 243.

it cannot be regarded as a genuine pre-estimate of the probable extent of the damage. Thus, it has been pointed out that illustration (d) clearly implies that even though the parties agree to pay 75 p.c. interest, the stipulation is by way of penalty and the courts should hold that parties are not bound by it, but should pay only reasonable compensation in lieu of such enhanced interest. The reason has been stated to be that the contract regarded as primary is the promise to repay the amount due to the creditor with interest, if any, agreed upon, and the contract to pay enhanced interest is regarded as a secondary one intended to secure the fulfilment of the primary contract; the courts do not feel bound to carry out such a secondary contract apart from its justice and reasonableness¹⁷. On the other hand, a provision in a mortgage deed for the payment of *deorha* (principal and half as much again) cannot be considered as a stipulation by way of penalty. It is merely an undertaking on the part of the mortgagors that they would pay at the time of redemption not the principal but a larger sum¹⁸. But a stipulation to pay Rs. 27,500 if a sum of Rs. 22,500 be not paid within a certain time is of the nature of a penalty¹⁹. An increased rent reserved in case of breach of covenant by lessee is not a penalty²⁰. Illust. (g) has been held to have no application to certain forms of chit fund transactions¹. A stipulation or a provision in a decree that the entire remaining balance will become due on failure to pay an instalment is not a penalty, so no relief can be given under this section. A distinction has been made between a decree of the above nature and a decree which does contain a penalty for non-compliance². The section applies to the case of a compromise decree, therefore, a court executing the decree may relieve against any penal provision contained in the compromise³. Where a compromise decree in a suit for ejectment and arrears of rent provides that the judgment-debtor will be allowed to occupy a portion as a tenant if he gives up possession of the remaining portion within one month and clears up arrears within three months and that in case of default the decree will be executable in toto, the default clause cannot be regarded as penal⁴. The court has jurisdiction to award relief against a penal clause in a decree⁵.

17 *Muthukrishna v. Sankaralingam*, 36 M 229 FB, see cases reld. to.

18 *Lala v. Hirajan*, 96 IC 538.

19 *Narayana v. Ponnusawmy*, 3 IC 933; see *Radhakishen v. Secretary of State*, 4 IC 607.

20 *Kanchari v. Nandi*, 1935 M 899; but see *Krishna v. Narayana*, 1949 M 618.

1 *Subbiah v. Muthia*, 65 MLJ 302, fold in *Raghavan v. Arumugham* 68 MLJ 283.

2 *Yeo Htean v. Abu*, 4 CWN 552 PC; *Rup v. Gopi*, 11 CWN 903; *Ko Kyan v. U. Ba*, 159 IC 801.

3 *Mohiuddin v. Kashmiro*, 55 A 334 FB All; *Chhunna Mal v. Hanuman*, AIR 1927 Lah 659; *Jwala Ram v. Mathura*, AIR 1931 Lah 696 (Lah); *Burjorji v. Madhavlal*, 58 B 610; *Allavarapu v. Jakka*, 169 IC 345; *Krishna Bai v. Hari*, 31 B 15 FB (Bom), disting. *Shirekuli v. Mahabliya*, 10 B 435; *Jaya Rao v. Venkata*, 80 IC 925 (Mad); *Surendra v. Secretary of State*, 24 CWN 545; *Ganesh v. Chandrar*, 28 CWN 984; *Shyam v. Indramani*, 1951 Ori 46; but the Patna HC has agreed with the decision in *Shirekuli v. Mahabliya*, and held that in the court executing the decree the plea that there was a penal clause in the agreement would not be entertained, see *Jiterdra v. Jashoda*, 92 IC 617.

4 *Hurai Lal v. Mahin Das*, AIR 1972 All 457, 460.

5 *Ahmed v. Balchand*, 1938 S 185.

Where a contract of sale contains a stipulation of forfeiture of instalments paid and the vendor claims to exercise his right on default by the purchaser, the purchaser is entitled to be relieved from such forfeiture⁶. Stipulations as to forfeiture of materials on demised premises⁷, or of money under a contract⁸, if not unreasonable, are not penal. A court of equity has jurisdiction to grant relief against forfeiture but not in all cases. Where an agreement is simply for the payment of money, relief is afforded against forfeiture on the ground that such a condition is intended merely as security for the payment of money⁹. A stipulation for forfeiture in a contract of insurance for non-payment before expiration of the days of grace is in the nature of a penalty against which relief may be obtained¹⁰. In case of sale¹¹ or lease¹², a stipulation for forfeiture is not a penalty¹³. Where a stipulation is penal the court will give reasonable compensation not exceeding the penalty stipulated for¹⁴. In case of non-payment of money on due date the court relieves against penalty or forfeiture, but when it is not a question of a penalty or a forfeiture, but a privilege is conferred upon payment of money at a stated period (e.g., a right to repurchase property sold), the privilege is lost if the money is not paid accordingly¹⁵.

4. Illustrations.—A stipulation not to partition may be binding between the parties and the sum fixed for breach of this agreement may be regarded as liquidated damages¹⁶. A stipulation to pay rent at the rate of Rs. 76 on the expiry of a lease and until a fresh settlement is made, while the landlord is actually getting Rs. 50, is penal¹⁷. A stipulation in a lease that should the tenant remain in possession on the expiry of the lease, he should pay rent at an enhanced rate is not in the nature of a penalty¹⁸. Where a lease is executed and simultaneously or as part of the same transaction the lessee purports to pay in advance the money payable under the lease by executing a bond making himself liable to pay the lease money, the question whether the bond is executed as a mere security for the due payment of the lease money or whether it entirely puts an end to the liability of the lessee depends on the intention of the parties gathered from the surrounding circumstances¹⁹. If on account of the delay of the vendor

6 *Blump v. Bombay Trust*, 54 B 381; see *Puushottam v. Sahu*, 91 IC 295.

7 *Karnaru v. Province of Bengal*, 1949 C 47.

8 *Subba v. Anna*, 1944 M 526.

9 *Harakh v. Saheb*, 6 CLJ 176.

10 *Sankunni v. Empire L. Assurance Co.*, 61 MLJ 388, 394.

11 *Natesa v. Appavu*, 38 M 178; *Crutchley v. Jernungham*, 2 Mer. 502; (1814-23) All ER Rep 703.

12 *Orr v. Chitha*, 28 IC 318.

13 *Venkatachari v. Ramalinga*, 45 IC 417; but see *Malayalam v. Nagasuri*, 1938 M 304.

14 *Beharilal v. Asaram*, 105 IC 477; *Mahabir v. Mohammad*, 83 IC 92; *Sheo v. Mithana*, 76 IC 500.

15 *Shanmugam v. Anna*, 1950 FC 38.

16 *Kuer v. Sukkhko*, 13 ALJ 6.

17 *Kalkesh v. Jaharullah*, 51 IC 984.

18 *Kuman v. Kachali*, 105 IC 20; *Kuman v. Radhika*, 124 IC 625; *Ramadin v. Kumodini*, 54 IC 901; but see *Abdul v. Karu*, 21 IC 443.

19 *Nana v. Muhammad*, 107 IC 249.

to make out a marketable title there is a delay in the completion of the purchase, the vendor is not entitled to ask for the provision in the nature of a penalty which the intending buyer was to incur in case of such delay²⁰. A seizure clause in a hire-purchase agreement, however severe in its terms, is not a stipulation amounting to a penalty¹.

A contract in effect that if the principal with 12 p.c. interest be not repaid within three months double the amount shall be payable cannot be enforced. Even a sum, fixed as liquidated damages, is not recoverable under the section as a matter of course, but it is taken as an outside limit. By claiming interest in the shape of paddy instead of money plaintiff cannot escape from the operation of this principle². A stipulation that if on a certain day an agreement remains wholly or in part unperformed, e.g., if an instalment remains unpaid, there is to be a certain forfeiture incurred, is to be treated as in the nature of a penalty³. Interest at the rate of 2 p.c. p.m. was regarded as unconscionable and the court reduced it to 6 p.c. per annum⁴. A provision in a bond that, on default in payment of the principal sum with 12 p.c. interest within a certain date, 25 p.c. of the total amount of the principal and interest due shall be added to the debt and will carry interest at 12½ p.c. p.a. is a penal provision and therefore unenforceable⁵.

A stipulation by a servant agreeing to pay double the amount of daily wages for the days of absence is one by way of penalty⁶. A promise to return double the value of the gifts made at the time of betrothal in case the promise of marriage be broken off is not enforceable, only reasonable compensation can be recovered⁷. A provision in a deed stipulating that in default of payment of maintenance by the defendant the plaintiff will be entitled to claim possession of certain fields for cultivation and appropriation of profits in lieu of maintenance is of the nature of a penalty⁸. In awarding compensation for the breach of a promise to marry the court may award under the section any amount which appears to the court to be reasonable not exceeding the amount named in the agreement⁹. The provision in a *kuraiwan* that on a prize-winner making default in paying a future instalment on its due date, the entire amount of all future instalments will become payable is not in the nature of penalty¹⁰. Where during

20 *Banku v. Galstaun*, 27 CWN 77 PC; *Crutchley v. Jerningham*, 2 Mer 502; (1814-23) All ER Rep 703

1 *Abdul v. Watson*, 125 IC 361

2 *Venkittarama v. Kambarath*, 1 M 349

3 *Ex. p. Hulse*, LR 8 Ch 1022; *Steedman v. Drinkle*, (1916) 1 AC 275; (1914-15) All ER Rep 298; but see *Mussen v. V. D. Land Co.*, 1938 Ch 253

4 *Rehana v. Zaman*, 11 IC 519; *Kamala v. Hasan* 1939 A 308; but see *Kalaram v. Shamrao*, 163 IC 562.

5 *Challagali v. Kappala*, 23 IC 542

6 *Narayan v. Faizkhan*, 49 IC 261; see *National P. Bank v. Marshall*, 40 Ch D 112 (agreement not to take service in a similar employment).

7 *Law v. Bow*, 11 R 143.

8 *Bana Bai v. Chandrabhaga*, 132 IC 450.

9 *Maung Sein v. Ma*, E 34 IC 159.

10 *Kynju v. Narayanan*, 140 IC 838 (see cases discussed); *Feri v. Ullan*, 1941 M 231.

the pendency of execution proceedings, the decreeholder agreed to accept a smaller sum in full satisfaction of the entire decree if payment was made within 2 months, and, in case of default, he was to proceed with the execution without the judgment debtor being competent to raise any objection, this was not a case of forfeiture of the kind where equity would relieve the judgment debtor¹¹. Where a mortgagor undertook to repay the loan in paddy, in default of delivering this paddy the price was to be charged at Rs. 3 a maund, and there was no suggestion that the mortgagor acted under undue influence, the fact that the result of the breach of his contract was that he had to pay nearly double the amount advanced would be no sufficient reason for holding that the contract was not binding¹². An administration bond does not come within the exception; therefore, only reasonable compensation can be recovered¹³. Where the primary and main agreement is to pay a sum of money which is not in excess of the decretal amount and it is only on failure to fulfil this agreement that any interest will be charged, the main agreement is not void¹⁴. Where an agreement for sale of immovable property provided that the party retracting from the contract should pay Rs. 10,000 as damages, and the purchaser broke the contract, whereupon the vendor resold the property at a loss of Rs. 1,000 but sued the original purchaser for the recovery of Rs. 10,000, no more than Rs. 1,000, the actual loss on resale, were allowed¹⁵.

There is no special law in India in respect of earnest money. Every case in which any question of earnest money arises can be decided on the provisions of Ss. 64, 65, 73 and 74. When a contract to sell is rescinded the seller must restore the benefits he has received under it, under S. 64 if he rescinds it himself, and under S. 65 if the purchaser rescinds the contract, *i.e.*, he must refund the earnest money. But when he rescinds it himself, if he has suffered any actual damage he is entitled to get compensation for it under S. 73, if he has suffered none he can be awarded a reasonable amount as compensation not exceeding the earnest money under this section, if there be the usual agreement of forfeiture in the contract under S. 74. Either sum, awarded as damages, can be set off against the amount of the earnest money he has to receive¹⁶. Where the plaintiff repudiates the contract into which he has entered with the defendants, he will not be entitled to recover that portion of the earnest money which he has paid¹⁷. The payment of earnest money is a custom or usage of trade in India as well as in England. It is normally paid under an implied agreement with the

11 *Kissen v. Madan*, 16 Pat 395.

12 *Ashraf v. Makhul*, 49 C 1040.

13 *Chandra v. Rohini*, 64 IC 366.

14 *Chatru v. Kondaji*, 38 B 219.

15 *Bhai Panna v. Arjan*, 51 CLJ 105, 111 PC.

16 *Bajirao v. Shivram*, 100 IC 860; *Pyarelal v. Balkishen*, 102 IC 766; but see *Dinanath v. Malvi*, 32 Bom LR 272 where it is said that S 73 or S 74 has no application to the case of a deposit as it is a payment actually made.

Roshan v. Delhi Cloth Mills, 33 A 166, fold in *Ram v. Central Flour Mills*, 155 IC 728.

vendee that if the contract is broken the vendor is entitled to retain the said amount, whereas if the contract is fulfilled the earnest money is credited as part payment of the price. Earnest money which is not in essential a penalty, but is a mere security for the fulfilment of an agreement, is excluded from the operation of the provisions of Ss. 63 and 64. Under S. 74 earnest money as such cannot be described as a stipulation by way of penalty. Forfeiture of the earnest money is not invariable when such payment is considerable in amount. If part payment of a portion of the purchase money be regarded by the court as analogous to earnest money given as a security for the due fulfilment of the contract it cannot be recovered¹⁸. But in *Re Dagenham*¹⁹ the earnest money being 50 p.c. of the total sum to be paid was not allowed to be forfeited. The incidents of earnest money have no application to a case where the understanding between the parties is that the original advance is to be immediately adjusted or is only to be adjusted in the final settlement of the contract between the parties²⁰. In the absence of any agreement between the parties that the whole of the advance payment of earnest money should be forfeited on breach of contract by the purchaser the seller must prove special damage. Even when there is an agreement between the parties that the whole of the advance payment shall be forfeited on breach of the contract, that agreement is subject to the provisions of this section¹. Earnest money is not only part payment but a guarantee of performance². Whether an advance paid under a contract is earnest money or part of the purchase money depends upon the real intention of the parties. If it be earnest money it is liable to forfeiture, if it be merely payment in advance of a part of the purchase money it can be claimed back on the failure of the contract³. Where the contract requires the buyer to deposit 25 p.c. of the total value of the goods and also further provides that the deposit shall remain as earnest money to be adjusted in the final bills and provides that no interest is payable to the buyer and that it shall be forfeited unconditionally on default by the buyer, and the buyer deposits 25 p.c. of the price the amount so deposited is a deposit as earnest money⁴. Advance paid as part consideration cannot be forfeited in the absence of provision for forfeiture though the defaulting party would be liable in damages⁵. A stipulation for the forfeiture of a certain amount paid by way of advance as a guarantee for the payment of a larger amount is not one by way of penalty⁶.

18 *Abbas v. Kodhusao*, 114 IC 461; *Kanhaiya v. Lakshmi*, 143 IC 192; *Ballabhdas v. Paikaji* 38 IC 915; *Krishna v. Khan*, 63 C 804, *refing to Chiranji v. Harswarup*, 1926 AIR PC 1; *Atul v. Sarat*, 24 CWN 967; *Dinanath v. Malvi*, 1930 B 213; *Muhammad v. Muhammad*, 41 A 324; *Mohammad v. Hamide*, 1945 A 70; *M.M.&M. Refinery v. M.S.S.I. Corpn.*, AIR 1974 Mad 39, 43; *Jay Kumar Jain v. Om Prakash*, AIR 1970 MP 119, 122.

19 LR 8 Ch 1022, *fold in Kanhai v. Lakshmi*, 1933 N 233.

20 *Laxmanrao v. Budhulal*, 103 IC 158

1 *Lachmi v. Damodar*, 81 IC 282.

2 *Tahilram v. Blackwell*, 19 IC 616.

3 *Raghubir v. Sundar*, 131 IC 371; *Nadiar v. Satish*, 105 IC 612.

4 *H. C. Mills v. Tata Air Craft*, AIR 1970 SC 1986.

5 *Mohd. Sultan Rowthar v. Naina Mohd.*, AIR 1973 Mad 233.

6 *Parampat v. Budh*, 1933 L 62.

Where a purchaser approved of the title but failed to pay the purchase money within the period stipulated, the vendor, under the agreement, was held entitled to forfeit the deposit, though there was a flaw in the title not then discovered by the purchaser⁷. Where in an agreement to sell there is no stipulation by way of penalty the buyer is entitled to a refund of the earnest money even if he fails to perform the terms of the contract in the absence of any proof of loss or damage incurred by the seller⁸. A deposit on terms that if certain work were not completed within a stipulated time, it should be forfeited, is a stipulation by way of penalty, and only reasonable compensation, not exceeding the penalty stipulated is recoverable⁹. A deposit made to secure performance of a contract can be forfeited only when a breach of contract occurs and results in a legal injury. The party seeking to forfeit must prove that he has sustained loss or injury, otherwise he cannot forfeit¹⁰. Even when earnest money is made forfeitable in case of breach, courts have to adjudge the reasonable compensation to which a party would be entitled to, in such circumstances¹¹. In order that the vendor may retain the deposit there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the remedy of specific performance but which would make his conduct amount to a repudiation on his part of the contract¹². In *Habibullah v. Arman*¹³ it has been laid down that the deposit, if nothing more is said about it, is according to the ordinary interpretation of businessmen a security for the completion of the purchase, so that in the event of the contract being performed it is brought into account, but if the contract is not performed by the payer it is forfeited by the payee. But every payment made by the purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his contract. It is incumbent on the court in each case to ascertain the real intention of the parties from all the terms of the contract. A vendor is entitled to the return of deposit on default in completion of the contract by the purchaser in the absence of any express stipulation in the contract to the contrary. It makes no difference that the money is in the hands of shareholders¹⁴. There is nothing illegal under a hire-purchase contract in a party enforcing his right to realise arrears of instalment while recovering the machine at the same time¹⁵. In order to entitle a plaintiff to relief from a penalty, it is necessary for him to show that there is some ground upon which it would be unconscionable in the defendants to retain the money. The mere fact that the plaintiff finds himself in difficulties is no ground for relieving him from the contract he has entered into¹⁶.

⁷ *Soper v. Arnold*, 14 AC 429.

⁸ *Surendranath v. Lohit Chandra*, AIR 1975 Gau 58.

⁹ *Pallonjee v. Lonavala Municipality*, 39 Bom LR 835; *Raman v. Nagu*, 1937 R 357.

¹⁰ *Variety Board Builders v. Union of India*, AIR 1973 Guj 256, 259-60.

¹¹ *Meenakshinada v. Murugesu Nadar*, AIR 1970 Mad 391, 395.

¹² *Doulattram v. Alibhai*, 33 IC 688.

¹³ 24 CWN 40, cited in *Pasumarti v. Thamandra*, 91 IC 765; *Sanam v. Manapalli*, 1941 M 108.

¹⁴ *Hall v. Burnell*, (1911) 2 Ch 551; (1911-13) All ER Rep 631.

¹⁵ *Thiori v. R. R.*, 1934 N 151.

¹⁶ *Museer v. V. D. Land Co.*, 1938 Ch 253

5. Effect of fixing a sum as penalty or liquidated damages.—Where parties name in a contract reduced to writing a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim an unascertained sum of money as damages. The right to claim liquidated damages is enforceable under S. 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach¹⁷. One point, however, is fully settled, namely, the term penalty or liquidated damages describing the nature of the payment is not conclusive of the rights of the parties, but the court may look to all the circumstances in order to ascertain the real nature of the transaction¹⁸. The term as used by the parties is not altogether to be disregarded as mere *brutum fulmen*. Where a sum of money is spoken of as a penalty the onus lies on those who seek to show that it is to be payable as liquidated damages¹⁹. Where the parties have mentioned a fixed sum as damages in case of breach, unless there is something to show that the amount is exorbitant or unconscionable the court would award that amount as damages for breach of the contract²⁰. A penalty clause merely fixes a maximum for damages which would be difficult to estimate in terms of money and does not deprive the aggrieved party of his right to the damages actually sustained¹. Where a contract provided for the payment of a sum of £20 for every week that the contractors were in default in the completion of certain work, though this amount was not a pre-estimate of actual damage, still the employers were entitled to recover this amount only and not more by way of compensation for delay². The fact that a penalty is stipulated in case of failure to complete the work within the stipulated time indicates that in case of such failure it is not the avoidance of the contract by the defendant that is contemplated but acceptance of performance after the stipulated time subject to the payment of damages which are fixed³. If a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done, i.e., the agreement cannot be avoided by paying the penalty. This is different from another class of contracts where a man may do an act on payment of what is agreed upon as the equivalent⁴. When interest is reduced by the court, the reduced rate is a claim under the contract, though the word

17 *Chunilal v. Century Spinning & Mfg. Co.*, AIR 1962 SC 1314.

18 *Kemble v. Farren*, 6 Bing. 141 : (1824-34) All ER Rep 641, fold. in *Wallis v. Smith*, 21 Ch D 243 ; *Bhai Panna v. Bhai Arjan*, 33 CWN 949 PC ; *Betts v. Burch*, 28 LJ Ex 267 ; *Diestal v. Stevenson*, (1906) 2 KB 345, 350.

19 *Willson v. Love*, (1896) 1 QB 626 ; *Pye v. British Automobile Syndicate*, (1906) 1 KB 425.

20 *Lekh v. Dwarka*, 113 IC 140.

1 *Belaji v. Sukamiya*, 68 IC 605 ; *Beharilal v. Asaram*, 105 IC 477.

2 *Cellulose Co. v. Widnes Foundry*, 1933 AC 20 : (1932) All ER Rep 567.

3 *Roberts v. Hyder*, 69 IC 894.

4 *French v. Madals*, 2 Dr & W 269, 274 : (1835-42) All ER Rep 6.

'penalty' is used in the section⁵. Where the question whether the interest claimed is a penalty depends on an interpretation of a clause in a deed, it is not a simple question of fact and may be raised in first appeal⁶. The court is not bound to allow a rate of interest not reserved in the contract but claimed in the suit, which would not have been penal if it was reserved in the contract⁷.

6. **Enhanced rate of interest.**—Stipulations for enhanced rate of interest may be of one of two kinds, the enhanced rate may be prospective or retrospective in its operation. When the contract is merely that if the sum borrowed is not paid at the due date it shall thenceforth carry interest at an enhanced rate, such a stipulation is not a penalty, but the higher rate may be recovered in its entirety. Enhanced rate of interest may be a penalty when in case of default of payment on the due date it shall be payable from the date of the contract. This has been held in the leading case of *Mackintosh v. Crow*⁸. A provision, therefore, for retrospective enhancement of interest, in default of payment of interest on due date, is generally a penalty which should be relieved against; but a proviso for enhanced interest in the future cannot be considered as a penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties⁹. Where the parties have stipulated that in case of default in payment on the due date of interest, or of principal, or of an instalment of principal, an enhanced rate of interest shall be payable from the date of the contract, the agreement has been regarded as of the nature of a penalty and relief has been granted against¹⁰. In another class of cases the contract is merely that if the money is not paid at the due date, it shall thenceforth carry interest at an enhanced rate. It cannot be said that there is any sum named in such a case as to be paid in case of breach¹¹,

5 *Suramma v. Venkayya*, 58 M 266.

6 *Ko Tine v. Ismail*, 68 IC 887

7 *Bhagwant v. Damodhar*, 178 IC 129

8 9 C 689; *Brahmanutra Tea Co. v. Scarth*, 11 C 545, 550, fold in *Dilbar v. Joysri*, 3 CWN 43; *Vengideswara v. Chatu*, 3 M 224, 228

9 *Uharkhan v. Salekhan*, 17 B 106; *Ganga v. Bishnu*, 1933 O 81.

10 *Rasaji v. Sayana*, 6 Bom HCAC 7; *Mazhar v. Sardar*, 2 A 769; *Muthura v. Luggun*, 9 C 615; *Bichook v. Ram Lochun*, 11 BLR 135; *Sungut v. Baijnath*, 13 C 164; *Kalachand v. Shih*, 19 C 392 FB; *Rameswar v. Raj Sham*, 29 C 43, 50; *Sajaji v. Maruti*, 14 B 274; *Trimbak v. Bhagchand*, 27 B 21; *Vengideswara v. Chatu*, 3 M 224; *Vythilinga v. Ravana*, 6 M 167; *Naniappa v. Naniappa*, 12 M 161; *Gopaludu v. Venkataratnam*, 18 M 175; *Kharag Singh v. Bhola Nath*, 4 A 8; *Khunni v. Kalimuddin*, 10 IC 572; *Muna v. Mansa*, 13 IC 624; *Deo v. Gulab*, 20 IC 949; *Narendra v. Oudh Commercial Bank*, 30 IC 323; *Sonai v. Randhir*, 35 IC 624; *Banke v. Alad*, 13 IC 473; *Mahammad v. Parma*, 45 IC 232; *Mohammad v. Kondiba*, 89 IC 119; *Jaswant v. Gajan*, 112 IC 602; *Sohna v. Imam*, 114 IC 444; *Laichand v. Narhar*, 89 IC 896; *Mahammad v. Naderajama*, 59 C 613; *Nanhak v. Ram*, 1939 P 457.

11 *Mackintosh v. Crow*, 9 C 689, 693; *Deno Nath v. Nibaran*, 27 C 421; *Ramendra v. Serejuddin*, 2 CWN 234; *Manoo v. Durga*, 2 CWN 333, reld. to in *Abdul v. Nandlal*, 30 C 15; *Dullabhdas v. Laksmandas*, 14 B 200; *Umarkhan v. Salekhan*, 17 B 106 FB; *Jaganadham v. Raghunadha*, 9 M 276; *Jwala v. Buchi*, 38 IC 533; *Ko Tine v. Ismail*, 68 IC 887.

The law as thus settled was upset, for a time at any rate, by the Privy Council decision in the case of *Balkishen v. Run Bahadur*¹². There the Judicial Committee was dealing with a decree; therefore, the decision is no authority on cases of contract¹³. Following the above Privy Council decision, it was held in certain cases that a stipulation for increased rate of interest, on default, from the date of the bond was not penal¹⁴. But these views have since been overruled¹⁵.

Now, however, the law is settled by the decision in *Sundar Koer v. Rai Sham Krishen*¹⁶, which states: "The Indian courts have invariably held that (as in the present) if the stipulation is retrospective, and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered as a penalty, because an additional money payment in the case becomes immediately payable by the mortgagor. Their Lordships accept that view of the statute." When in a decree in a mortgage suit the court grants interest on the decretal amount at a higher rate than the contract rate the increase is in the nature of a penalty¹⁷. In the absence of a specific provision to the contrary the parties must be deemed to have intended that the enhanced rate of interest would run from the date of default. The circumstances of each case have to be taken into consideration for determining whether the particular covenant for payment of enhanced interest is excessive or unconscionable¹⁸. One test is whether the enhanced interest was intended to be part of the primary contract between the parties or was introduced only *in terrorem*¹⁹. In fact it has been said that a stipulation for increased interest is always to be regarded as a penalty but it may be allowed if the plaintiff claims it from the date of default²⁰. An increased rate of interest in case of default provided for in a bond does not amount to penalty when the bond also specifically provides for penal interest at a still higher rate¹.

7. Explanation.—A covenant for enhanced interest from the date of default may or may not be a stipulation by way of penalty. Whether such a stipulation is penal depends upon the construction of the document and the intention of the parties². A provision for an enhanced rate of interest from the date of default, not from the date of the bond, is not by way of

12 10 C 305 PC.

13 See *Naniappa v. Naniappa*, 12 M 161; *Kalachand v. Shib*, 19 C 392.

14 *Banwari v. Muhammad*, 9 A 690, 699; *Banke v. Sundarlal* 15 A 232; *Baij Nath v. Shah Ali*, 14 C 248; See *Arjan v. Ashgar*, 13 C 200; *Basavayya v. Subbarazu*, 11 M 294; *Narayanasami v. Narayana*, 17 M 62; *Nanhak v. Ram*, 1939 P 457.

15 *Brij Bhukan v. Samiuddin*, 25 A 169; *Kalachand v. Shib*, 19 C 392 FB.

16 34 IA 9.

17 *Benode v. Hira*, 44 IC 726, 1918 Pat 76

18 *Kandhi v. Hussein*, 77 IC 768.

19 *Rajinder v. Bhagwan*, 128 IC 287; *Pal v. K. A. Firm*, 76 IC 835.

20 *Mohammad v. Kondiba*, 89 IC 119; see *Nanhak v. Ram*, 183 IC 866; see *Bhagwant v. Damodhar*, 1938 N 91.

1 *V. P. Bhandar Ltd. v. Fatima Bai*, AIR 1971 Mys 250.

2 *Sohna v. Imam*, 114 IC 444; *Deno Nath v. Nibaran*, 27 C 421; *Maula v. Labhu*, 157 IC 200. The Explanation has been elaborately discussed in *Mahammed v. Nidenahama*, 59 C 613.

penalty if the provision forms part of the primary contract and if the enhancement is reasonable³. There is nothing in the Explanation to preclude a court from holding that the stipulation ought not to be regarded as a stipulation by way of penalty⁴. The Explanation, read by the light of the illustrations, shows that it is for the court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty. If it is, the court may award reasonable compensation not exceeding the penalty stipulated for. The Explanation provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty, e.g., if there be something unconscionable or unreasonable about the agreement or the enhanced rate of interest be not moderate⁵. Considering the unusual nature of the transaction the provision on default of payment of interest at a slightly higher rate was not considered to be penal⁶. A provision for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be a part of the primary contract between the parties⁷. The Explanation therefore says nothing more than what was already laid down in several cases. It does not purport to make any change in the law as enunciated in the old section⁸.

8. Compound interest.—The courts do not lean towards compound interest, they do not award it in the absence of a stipulation, but where there is a clear agreement for its payment it is, in the absence of disentitling circumstances, allowed⁹. In the absence of proof of undue influence, exorbitant amount, dealing with an ignorant person, or the like, a stipulation for payment of compound interest, on failure to pay simple interest, at the same rate, is not a stipulation by way of penalty within the meaning of the present amended section, therefore it cannot be relieved against¹⁰. S. 74 does not

3 *Jyoti Cold Stores v. Punjab Financial Corporation*, AIR 1973 Punj 38.

4 *Sankaranarayana v. Sankaranarayana*, 25 M 343

5 *Abbakke v. Kinkhiamma*, 29 M 491; *Devindra v. Sambhu*, 84 IC 677.

6 *Vishnu v. Tallapragada*, 85 IC 392; *Mylapore H. P. Fund v. Sabapathi*, 53 MLJ 272, 278.

7 *Umarkhan v. Salekhan*, 17 B 106, 113 FB.

8 *Pardhan v. Narsing*, 26 C 300, 310; *Umarkhan v. Salekhan*, 17 B 106, 113 FB; *Sankaranarayana v. Sankaranayana*, 25 M 343, 346; *Devindra v. Sambhu*, 84 IC 677, an increased rate of interest prior to date of default was always deemed a penalty.

9 *Ganga Pershad v. Land Mortgage Bank*, 21 C 366, *refd.* to in *Hari v. Ramji*, 23 B 371; *Asaram v. Dnanoba*, 105 IC 758; *Sitaram v. Ramrao*, 130 IC 817; *Chiranji v. Dost*, 79 IC 995; *Ram v. Nanak*, 91 IC 762; *Alu v. Sukhan*, 3 A 620, 627 FB; *Khallo v. Jawala*, 101 IC 759; but see *Chajmal v. Brij Bhukan*, 17 A 511.

10 *Ganga v. Bachchu*, 25 A 26; *Surya v. Jogendra*, 20 C 360, 364; *Janki Das v. Ahmad*, 25 A 159; *Abdul v. Puran*, 25 IC 560; *Malli v. Veeranna*, 41 MLJ 470; *Aziz Khan v. Duni Chand*, 23 CWN 130 PC; *Balla Mal v. Ahad Shah*, 23 CWN 233 PC; *Mangat Rai v. Babu Singh*, 103 IC 437; *Ramalinga v. Subramania*, 50 M 614; *Pardhan v. Narsing*, 26 C 300, 310; *Kisanlal v. Kisansingh*, 103 IC 148; *Ram v. Mahabir*, 64 IC 247; *Tirkharam v. Haidar*, 107 IC 617; *Chhannu v. Raj*, 43 IC 295; *Ananjaperumal v. Pichamuthu*, 47 MLJ 910; *Ram v. Baldeo*, 47 IC 649; *Kailash v. Latiffanessa*, 5 IC 556; *Mathura v. Durjan*, 2 A 639; *Muthu v. Annamalai*, 1936 Rang 141; *Kamarasu v. Damojee-purapu*, 104 IC 827; *Ramdas v. Abbas*, 56 IC 74; *Gurmukh v. Dial*, 150 IC 878; *Maniqadina v. Sukhdeo*, 1933 IC 224.

say that in every case an increase of the rate of interest should be treated as a penalty, it would be difficult to say that a change from simple to compound interest, when interest was only at the rate of 12 p.c., would amount to a penalty within the meaning of S. 74¹¹. In English law compound interest cannot be charged on the money due on a mortgage account in the absence of a contract between the parties¹². There cannot be a title to compound interest without a contract expressed or implied. In the case of advances to customers in mercantile accounts it ceases on the death of the customer¹³. Where a sum of money was borrowed at 25 p.c. compound interest, the interest was held to be recoverable. Under the Usurious Loans Act two conditions must be satisfied before the debtor can be relieved : (i) the interest must be excessive ; and (ii) the transaction substantially unfair as between the parties¹⁴. Thus, compound interest at 300 p.c. in default of payment on the due date is a stipulation by way of penalty¹⁵. A clause in a mortgage deed providing for the payment of simple interest but that in case of default the interest already accumulated should be added to the principal and thereafter compound interest should be paid on the whole is penal¹⁶. The court in such a case either gives compound interest at the original rate or simple interest at the enhanced rate¹⁷. Compound interest may be allowed where there is a specific agreement or course of dealing between the parties showing an agreement to pay it¹⁸. 'There is no rule which their Lordships can discover, which binds them when the terms of a loan are challenged, to lean to their reduction or to presume that simple interest must always be judicially preferable to compound interest, or that rates, because they might seem high here, must be unreasonable in India. Compound interest is common and may often be necessary and proper in India under the circumstances of that country. The matter is not one upon which, one way or the other, Their Lordships' Board ever decided that there is presumption in one way'¹⁹. The debtor must show that there is some stipulation in the contract regarding the payment of the interest which is penal. An agreement to pay compound interest is not by itself a stipulation by way of penalty²⁰. The interest upon interest is clearly part of the contract ; the fact that under the section the court is given the power to reduce that rate under certain contingencies does not make the interest at the reduced rate any the less

11 *Lakhi Chand v. Pear Chand*, 2, Pat LJ 283 ; *Kanheti v. Neti*, 1934 M 31 FB.

12 *Page v. Broom*, 4 Cl&F 436

13 *Fergusson v. Fyffe*, 8 Cl&F 121 : (1835-42) All ER Rep 48 ; *Williamson v. Williamson*, LR 7 Eq 542.

14 *Narendra v. Paban*, 52 CLJ 73 ; *Budhsingh v. Baldeo*, 69 IC 681, interest at 1 p.c. p.m. compoundable not penalty ; *Abdul v. Sheodayal*, 56 A 496 ; *Mukteshwar v. Satya*, 1939 P 360 (18 p.c. not penal).

15 *Ganapathi v. Sundara*, 22 MLJ 354.

16 *Nihora v. Mathura*, 81 IC 758.

17 *Kaluram v. Shamrao*, 163 IC 562 ; *Dadhu v. Somnath*, 7 IC 547 ; *Sundersa v. Chotmal*, 163 IC 954.

18 *Hiralal v. Lachmi*, 50 CLJ 183 PC ; *Maine E Power v. Hart*, 57 MLJ 662 PC ; *Rankiah v. Bansi*, 116 IC 43 ; see *Eaton v. Bell*, 5 B&Ald 34.

19 *Sunder Mull v. Satya*, 32 CWN 657 PC.

20 *Suryendra v. Jogendra*, 62 IC 717.

a claim under the Contract Act. The mere use of the expression ¹penalty for damages ought not to be understood as amounting to a claim outside the contract¹.

A provision for compound interest at an enhanced rate has, however, been differently treated. A Their Lordships of the Privy Council have observed : Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty². Where a mortgagor agreed to pay 5½ p.c. simple interest but if he failed to pay the interest, compound interest at 12 p.c. would be paid, the stipulation was not regarded as a penalty. Whether such a stipulation is a penalty or not is a question of construction and what one has to ascertain is what the parties really intended by it³. A clause providing for compound interest on the entire sum advanced to the debtor in the event of his failing to deliver a fourth part of the mortgaged property to the mortgagee has been held to be an unconscionable bargain⁴. A stipulation for the annual capitalisation of principal and interest at the contract rate is not by way of penalty⁵. A lender may protect himself against a breach by the borrower, of his contract to pay interest, by an agreement that in case it be not paid punctually the lender shall be entitled to add it to the principal, and so recover compound interest, or that simple interest at a higher rate will be charged. But he cannot stipulate for both kinds of damages, namely, for compound interest at an increased rate⁶. Having regard to the very general words of the section the court can treat any stipulation, the object of which is to secure the performance of the main contract between the parties, as a penalty. In case of stipulation for the payment of 18 p.c. simple interest with a separate agreement for payment of compound interest at the same rate, the latter was regarded as penal. It has been observed that there is no distinction in principle between a provision for compound interest at the same rate as the original rate of interest and a

1 *Vepa v Chakka*, 58 M 266

2 *Sundar Koer v. Rai Sham Krishen*, 34 IA 9 ; *Mangat Raj v. Babu Singh*, 103 IC 437 ; *Kamarazu v. Damojeeapurapu*, 104 IC 827 ; *Beharilal v. Asaram*, 105 IC 477 ; *Baidnath v. Shamanand*, 22 C 143 ; *Rameswar v. Rai Sham*, 29 C 43, 51 ; *Syed Bavuddeen v. Esaff*, 3 IC 20 ; *Dadnu v. Somnath*, 7 IC 547 ; *Sant v. Chhuta*, 20 IC 667 ; *Gauri v. Dohan*, 43 IC 459 ; *Muhammad v. Indrapati*, 100 IC 679 ; *Gangadhar v. Parashram*, 106 IC 38 ; *Raja Venkata v. Gade*, 64 CLJ 141 PC ; *Muthu v. Marutha*, 58 MLJ 435 ; *Rama v. Neti*, 148 IC 467 FB ; but see *Abbakke v. Kanhiamma*, 29 M 491, 496 ; *Annamalai v. Veera*, 26 M 111 ; *Venkata v. Subbayya*, 38 Bom LR 1229 PC ; *Raja Venkata v. Gade*, 64 CLJ 141 PC ; *Kanketi v. Neti*, 1934 M 31 FB.

3 *Jai Ram v. Sheo Shankar*, 9 IC 406 ; but in *Rajaram v. Maneklal*, 34 Bom LR 55 the court reduced 12 p.c. compound interest to 12 p.c. simple interest ; see *Kisanlal v. Kisan Singh*, 103 IC 148 ; per contra *Ram v. Gopala*, 1932 N 169.

4 *Jawaya v. Mulraj*, 136 IC 556.

5 *Sarju Prasad v. Benimadho*, 1883 AWN 208 ; *Ajimuddin v. Rafatulla*, 50 IC 383.

6 *Dip Narayan v. Dipan Rai*, 8 A 185 ; per contra *Appa Rau v. Suryanarayan*, 10 M 203 ; see *Abbakke v. Kanhiamma*, 29 M 491, 496.

provision for a higher rate of interest than the original rate. The question in each case will be whether the stipulation is penal.⁷

9. Interest payable if principal not duly repaid.—Where there was a stipulation for the payment of interest at a specified rate, which the court regarded as exorbitant, if the principal or a part thereof was not paid on the due date, the court observed in *Moloji v. Sheikh Hosain*⁸, that the rate of interest was penal and granted relief in spite of Act 28 of 1855. The uniformity of the current of decisions was arrested by the cases of *Arjan Bibi v. Asgar Ali*⁹ where it was held that as there was one rate of interest provided by the contract the cases came under Act 28 of 1855 and not this section. Notwithstanding this small group of cases, the more modern cases repudiate the doctrine that one rate of interest, however exorbitant, cannot be deemed penal. Thus, stipulations to pay interest at the rate of 75 p.c. or 60 p.c. on failure to pay the principal sum in instalments on specified dates have been held to be in the nature of a penalty¹⁰.

The test to be applied to determine whether a contract contains a stipulation by way of penalty is to find out whether the agreement to pay the damages for the breach of covenant or contract is unconscionable and extravagant such as no court ought to allow to be entered upon¹¹. It is impossible to lay down as to what may or may not be unconscionable or extravagant to insist upon without reference to the particular facts and circumstances which are established in the individual case¹². Where a bond carries no interest but provides that in case of default of payment of any instalment the entire amount of the debt found due at the time of default will become payable at once with interest at the rate of Rs. 2 p.c. *per mensem* from the date of execution of the bond, no interest being charged until default, the provision as to payment of interest might be treated as a penalty, if exorbitant¹³.

7 *Venkataramiah v. Subramania*, 37 IC 799.

8 6 BHC 8; *Pava v. Govind*, 10 BHC 382; *Bansidhar v. Bu Ali*, 3 A 260; *Chuhar Mal v. Mir*, 2 A 715; *Bhagwansa v. Amin*, 65 IC 963; *Bishen v. Narain*, 110 IC 311; *Najaf v. Muhammad*, 107 IC 249; *Maya Ram v. Nawbat*, 1885 AWN 85; *Vythilinga v. Ravana*, 6 M 167, but in *Kunjbehari v. Ilahi*, 6 A 64, 24 p.c. interest was not allowed.

9 13 C 200; *Gokal v. Khwaja*, 1890 PR 32; *Lachhman v. Santa*, 64 IC 350; *Sankaranarayana v. Sankaranarayana*, 25 M 343; *Chunna v. Pedda*, 26 M 445; *Periaswami v. Subramanian*, 14 MLJ 136; *Krishna v. Brojo*, 7 CWN 876; *Prayag v. Shyam*, 31 C 138; one rate payable from date of bond, per contra *Kanhaya Lal v. Narayan*, 1894 PR 99.

10 *Miajan v. Abdul*, 10 CWN 1020; *Velchand v. Flagg*, 36 B 164; *Krishna v. Sanat*, 44 C 162; *Titti v. Dooda*, 8 IC 301; per contra *Periathambi v. Aagammal*, 19 MLJ 630. See in this connection *Ganapathi v. Sundara*, 22 MLJ 354; *Salem Town Bank v. Venkata*, (1911) 1 MWN 134; *Kali v. Muhammad*, 54 IC 833; *Trimbak v. Bhagchand*, 27 B 21; *Muthukrishna v. Sankaralingam*, 36 M 229 FB; *Nathuni v. Baijnath*, 39 IC 352; see the conclusions drawn in *Mahammad v. Naderjama*, 59 C 613; see post.

11 See *Webster v. Bosanquet*, 1912 AC 394.

12 *Clyde Bank Engineering Co. v. Castaneda*, 1905 AC 6; (1904-07) All ER Rep 251; *Khagram v. Ramasankar*, 42 C 652; *Upendra v. Meheraj*, 21 CWN 108; *Nabo Kumar v. Abdul*, 21 CWN 112.

13 *Bishen Chand v. Narain*, 110 IC 311; see *Habibuni v. Baldeo*, 154 IC 200; *Ajodhya v. Gobind*, 1946 P 404 (debt not non-interest bearing).

A penal clause in a contract (e.g., as regards the rate of interest) cannot be enforced, and the court is not bound to allow a rate of interest not reserved in the contract¹⁴. It would not be right to hold that in every case where there is a stipulation for payment of interest on non-payment of rent within a certain time it must be taken to be penal¹⁵. Where interest at 18½ p.c. became payable only on default in the regular payment of monthly instalment of the principal sum due, the stipulation as to interest was not regarded as penal¹⁶.

10. **Reduced rate of interest on punctual payment.**—A mortgagee may stipulate for a higher rate of interest in default of punctual payment. In order that such a stipulation may be effected he must reserve the higher rate of interest as the interest payable under the mortgage and provide for its reduction in case of punctual payment. He cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non-payment of the lower rate at the appointed time, such an agreement being considered in equity as in the nature of penalty. Where there is an absolute covenant by a mortgagor to pay a certain rate of interest with a promise that the mortgagee will take less if the mortgagor punctually makes the payment on the days fixed for such payment the agreement is valid¹⁷. A promise to pay interest at a certain rate, with an option to pay a lower rate in a certain contingency, does not make the original rate of interest a penalty¹⁸. A stipulation to pay a higher rate of interest on default in repayment of a loan on a specified date is of the nature of penalty¹⁹. If a mortgagor agrees to pay 5 p.c. and the mortgagee agrees to take 4 p. c. if it is paid punctually, that is a perfectly good agreement; but if the mortgage interest is 4 p.c. and there is an agreement that if it is not paid punctually, 5 p.c. shall be paid, that is in the nature of a penalty. It is not the high rate of interest which constitutes the penalty. Having made the contract with his eyes open the mortgagor cannot complain that the rate of interest is heavy or that it is in the nature of a penalty. So also if the contract provides that the interest for the first two years shall be 5 p.c., for the next two years 6 p.c., and so on, that is a perfectly good contract. It is quite distinct from a stipulation that if the interest be not paid regularly the amount shall be increased²⁰.

11. **Where the rate of interest is exorbitant.**—A court is competent to grant relief whenever the rate of interest appears to the court to be penal, although the provision for payment of interest mentions one rate only¹.

14 *Bhagwant v. Damodar*, 1938 N 112.

15 *Rajkumar v. Girindra*, 41 CLJ 453.

16 *Salem Town Bank v. Venkatachar*, 9 IC 197.

17 *Union Bank v. Ingram*, 16 Ch D 53.

18 *Kirti Chunder v. Atkinson*, 10 CWN 640; *Administrator-General v. Moolla*, 5 Rang 573; *Kulada v. Ramananda*, 48 C 1036, 1041.

19 *Hanuman v. Nilmoni*, 52 IC 335. The court give reasonable compensation *Shao v. Mithana*, 76 IC 500.

20 *Herbert v. S. & Y. Ry. Co.*, LR 2 Eq. 221.

1. *Krishna v. Sanat*, 44 C 162, 34 IC 609, foling *Bouwang v. Banga*, 20 CW 408; *Gopeshwar v. Jadav*, 43 C 632; *Abdul v. Khirade*, 42 C 690; *Khagram v. Ram*, 42 C 652; *Sanat v. Indra*, 21 CWN 740; but see *Nazir v. Raghunath*, 30 CLJ 24 PC See a 9.

The Patna High Court allowed the contract rate of interest at 75 p.c. because no undue influence was proved². The Calcutta High Court reduced interests varying from 150 to 300 p.c. as they were exorbitant and therefore regarded as penalty³. The Lahore High Court has observed that a penal rate of interest is neither contrary to law nor voidable at the instance of the party making the stipulation, but the plaintiff is entitled only to reasonable compensation⁴. A high rate of interest (6½ p.c. p.m.) stipulated to be paid on arrears of rent in the absence of special circumstances is not penal⁵. A penal rate of interest may be reduced but interest should not be disallowed altogether⁶, thus 18 p.c. compound interest was reduced to 10 p.c. simple interest⁷. A stipulation for payment of interest at the rate of 36 p.c. has been regarded as penal⁸, also as not penal⁹. When the alleged penal rate is a common rate of interest, such as 12 p.c., the court should not depart from it¹⁰. Where the consideration for a bond was Rs. 5,000 and a sum of Rs. 3,400 representing interest calculated in advance for 34 months at the rate of 2 p.c. p.m., and the obligor agreed to repay a sum of Rs. 8,400, the plaintiff was not allowed interest on sums repaid¹¹. A stipulation that if paddy rent be not paid within a certain time, then in the next year half as much grain of paddy would be required to discharge the arrear is a stipulation by way of penalty¹². A stipulation for enhanced interest at an exorbitant rate is a stipulation by way of penalty and the plaintiff is entitled to no more than reasonable compensation for the breach of contract¹³. Where a *karta* borrows money at a high rate of interest, the question is entirely one of authority of the *karta* to borrow at the rate stipulated and not whether the rate stipulated is hard or unconscionable under S. 16. The court has no discretion to fix a fair rate of interest apart from what was beyond the authority of the *karta* to offer¹⁴. In a case where there is nothing to show that there was any fraud or undue influence the court cannot modify the terms as to interest made by the parties¹⁵. In other words, where parties have stipulated for the payment of interest at a certain rate, the interest will not be affected by the consideration of the reasonableness or otherwise of the rate¹⁶. A court is competent to grant relief whenever the rate of interest appears to

2 *Nathuni v. Baijnath*, 2 Pat LJ 212, 217; *Satyabhama v. Mohamed*, 68 IC 497.

3 *Mahammad v. Naderajamma*, 59 C 613.

4 *Shugan v. Phulchand*, 158 IC 359.

5 *Abdul v. Safar*, 42 IC 614; *Rehana v. Zaman*, 11 IC 519, 2 p.c. p.m.; *Habibun v. Baldeo*, 154 IC 200.

6 *Hrishkesh v. Lakhs*, 46 IC 384; but see *Bhagwant v. Damodar*, 1938 N 112.

7 *Lal Singh v. Surjan*, 15 ALJ 124; *Rajaram v. Maneklal*, 34 Bom LR 55.

8 *Jamur v. Ram*, 32 IC 697.

9 *Subramania v. Subramama*, 22 IC 411.

10 *Vadlamannati v. Damera*, 25 IC 702.

11 *Kering v. Bayley*, 44 B 775. (Usurious Loans Act entitled court to give relief); *Mazhar v. Sardar*, 2 A 769; *Chumal v. Christopher*, 50 B 107 (court not entitled to reduce interest at 75 p.c. under the above Act).

12 *Shyamal v. Kalim*, 58 C 84; see *Kanchari v. Nandi*, 1935 M 899.

13 *Mahabir v. Mohammad*, 83 IC 92.

14 *Sunder Mull v. Satya*, 32 CWN 657 PC.

15 *Mehtab v. Iqbal*, 125 IC 629.

16 *Ghaleb v. Kansa*, 7 A 333.

the court to be penal, although the provision for payment of interest mentions one rate only¹⁷. Under the section the Appellate Court has jurisdiction to cut down the rate of interest which is penal though no issue has been raised on that point¹⁸. See n. 9.

In some cases the courts, without apparently considering the provisions of this section, have held that relief cannot be given against an excessive rate of interest unless the case comes under S. 16, *i.e.*, the court finds that the lender was in a position to dominate the will of the borrower when the contract was entered into¹⁹.

12. Assessment of damages.—The expression “reasonable compensation” used in the section necessarily implies that the court is to exercise its discretion and that the discretion so vested must be exercised with care, caution and on sound principles. When the injury consists of a breach of a contract, the court, acting upon the above principles, would assess damages with a view to restoring to the plaintiff such advantage as he might reasonably be expected to have derived from the contract had the breach never occurred. There are of course cases in which it is impossible to fix the exact amount of damages; in such cases the courts of equity do not interfere with the contract of the parties, who, in anticipation of the breach of contract, have stipulated that a fixed sum shall be regarded as the measure of compensation to be paid by the person who violates the contract²⁰. What is reasonable compensation must depend on the circumstances of each case¹. To disregard the provisions of the section in assessing damages is a material irregularity within the meaning of S. 115 of the Civil Procedure Code². Where it was agreed that if a tenant did not execute a fresh *kabuliat* he would pay rent at a much higher rate on the expiry of the term, the Full Bench of the Calcutta High Court differed in its opinion, it being held by the majority that the stipulation came within the purview of this section, was of the nature of a penalty, therefore could be relieved against³. For failure to take up a loan as stipulated, the claim of the lender to recover as damages the difference between the interest on the sum promised to be taken by the borrower and that paid by the banker, where it was lying in deposit, for the full period for which the loan was to be made, was not allowed, but the plaintiff was held entitled to interest for the time required to find another borrower⁴. A provision contained in a lease whereby the lessee is made liable to deliver to the lessor 5 *mudis* of rice as additional rent

17 *Sanat v. Indra*, 21 CWN 740.

18 *Marina v. Changanti*, 117 IC 124.

19 *Devi Sahai v. Ganga Sahai*, 32 A 589; *Gendan Lal v. Sahzadi*, 18 IC 765; *Bejoy v. Satish*, 24 CWN 444.

20 *Nait Ram v. Shib Das*, 5 A 238, distgd. in *Dilbar v. Joysri*, 3 CWN 43, where in assessing damages such amount as would be likely to prevent any future breach of the contract was taken into consideration.

1 *Kabibun v. Baldeo*, 154 IC 200.

2 *Mang Tha v. Shwe*, 27 IC 885; *Muthia v. Rama*, 1935 M 1072 (appeal court not to interfere lightly with compensation awarded).

3 *Ejendro v. Bakai*, 22 C 658; but see illust. (e).

4 *Shabbar v. Abubakar*, 12 B 242.

if the lessee should fail to pay in proper time the Government revenue or interest on a mortgage or the rent due to the lessor is not by way of penalty but by way of liquidated damages⁵.

Where a contract for the construction of sewerage works provided that a lump sum of £ 100 and £ 5 for every seven days during which the works remained incomplete, after a specified day, might be recovered "as and for liquidated damages," as the sums were payable on the happening or not happening of a single event they were to be regarded as liquidated damages and not as penalty and were therefore recoverable⁶. On the other hand, where it was agreed between the manager of a theatre and a principal comedian that for breach of any one of a number of stipulations between the parties, of varying degrees of importance, a sum of £ 1,000 should be paid by one party to the other, this stipulation was of the nature of a penalty⁷. Where there is a debt and the creditor agrees to reduce it and grant an extension of time, provided it is secured in a certain way and also repaid within a certain date and on default of any of the stipulations, the whole of the original debt will be payable, the stipulation is not a penal one⁸; because a penalty is something which a debtor is to pay, over and above his original liability, as a punishment⁹.

13. Exception.—Although the exception says that a person entering into any of the specified bonds shall be liable upon the bond to pay the whole sum mentioned therein, that does not mean that the court is bound to exact the whole of the liability to the extent mentioned in the bond and to pass a decree for the whole amount. All discretion is not taken out of the hands of the court, so that it can reduce the amount of the penalty according to the circumstances of the case¹⁰. Where a license to import a foreign car is granted on condition that the licensee shall re-export the car within a certain time, and the licensee executed a bond agreeing to pay a certain sum in case of the non-fulfilment of the condition, the entire sum can be recovered on his failure to re-export, because the said sum is not a penalty. Besides the fulfilment of the condition is an act in which the public are interested as contemplated by the exception¹¹. A bond given by the collector of tolls of a market providing for the payment of a sum of Rs. 50 in the event of his non-compliance with certain conditions is a bond given for the performance of a public duty and is not one within the meaning of the exception of this section and the plaintiff is entitled to recover a reason-

5 *Balkuraya v. Senkamma*, 22 M 453; *Wallis v. Smith*, 21 Ch D 243, 258; *Elphinstone v. Monkland I. & C. Co.*, 11 AC 332.

6 *Law v. Local Board of Redditch*, (1892) 1 QB 127; *Clydebank Engineering Co. v. Castaneda*, 1905 AC 6; (1904-07) All ER Rep 251; *Webster v. Bosanquet*, 1912 AC 394.

7 *Kemble v. Farren*, 6 Bing 141; (1824-34) All ER Rep 641.

8 *Thompson v. Hudson*, LR 4 HL 1.

9 *Re Burden*, 16 Ch D 675.

10 *Secretary of State v. Delizian Freres*, 45 B 1213.

11 *B. N. Mathur v. Union of India*, AIR 1974 Mad 233.

able compensation from the defendant¹². In the case of an administration bond, on breach of a condition, the whole amount of the bond does not become payable under this section¹³. Otherwise than in the case of bonds specified in the section the rule seems to be here the same as in English law, viz., the question whether a sum payable on infraction of a term is to be regarded as penalty or liquidated damages is to be construed in the same manner as in the case of an ordinary contract according to the intention of the parties¹⁴.

14. Where the section does not apply.—The party to a contract taking security deposit from the other party to ensure due performance is not entitled to forfeit the deposit on the ground of default; he is only entitled to reasonable compensation. In *Union of India v. Rampur Distillery Co. Ltd.*¹⁵, the rum supplied by the Company to the Union of India was found not to conform to the quality stipulated. The Union cancelled the contract and forfeited the entire security deposit of Rs. 18,332. The Company having disputed the right of the Union to forfeit the security the dispute was referred to an arbitrator who held that the Union was entitled under sec. 74 to the award of reasonable compensation only, which was fixed at Rs. 7,332. The award and the judgment in terms thereof were upheld by the Supreme Court on appeal by the Union. The Supreme Court relied on an earlier decision, namely, *Maula Bux v. Union of India*¹⁶, wherein it was held that the amount deposited as security to ensure due performance cannot be regarded as earnest money, and that the term authorising forfeiture of security is in the nature of a penalty.

A stipulation between an employer and an employee that the latter should give 15 days' notice before leaving the former's service, in default forfeit all arrears of wages, is not illegal or contrary to public policy, or one by way of penalty; it is therefore enforceable¹⁷. But in the case of a stipulation for work on Sunday, if required, with an allowance for overtime pay and liability to summary dismissal and forfeiture of 15 days' wages on refusal, the prescribed penalty of forfeiture of pay for 15 days was not allowed to be exacted¹⁸. On failure of the purchaser to purchase according to the contract of sale, forfeiture of the purchase money by the seller is not regarded as a penalty¹⁹. A provision in a lease for re-entry for a breach of covenant cannot be regarded as a stipulation by way of penalty and therefore as coming within this section²⁰. The terms of the section are not applicable

12 *President of Taluk Board v. Burde Kamphthi*, 31 M 54; *Srinvasa v. Rathnasabapathi*, 16 M 474.

13 *Lachman v. Chater*, 10 A 29; *Chandra v. Rohm*, 64 IC 366; see author's Commentary on the Indian Succession Act, S. 292 note.

14 *Mercer v. Irving*, 27 LJQB 291.

15 AIR 1973 SC 1098.

16 AIR 1970 SC 1955.

17 *Empress of Indian Cotton Mills Co. v. Naffer*, 2 CWN 687, fold in *Aryodaya Spinning & Weaving Co. v. Siva Virchand*, 13 Bom LR 19.

18 *Ambar Singh v. Karam Singh*, 25 IC 441.

19 *Bhai Panna v. Bhai Arjan*, 31 Bom LR 909 PC.

20 *Sylhet v. Pinto*, 42 M 654.

to decrees and a decreeholder is entitled to recover interest at the rate prescribed in the decree¹.

15. Instalment.—When there is a present debt and an agreement to pay it in instalments, a stipulation that on non-payment of an instalment the whole amount is to become payable does not constitute a penalty. An acceleration of payments is not a penalty². The illustrations to the section make it clear that in order that a stipulation may amount to a penalty some further sum is to be paid by the person giving the undertaking, larger than the amount that was due from him, independently of the agreement. The term 'penalty' cannot properly be applied where all that is agreed between the parties is that they shall revert to the situation existing immediately prior to the new agreement, even though that may involve liability on the part of one of them for a sum greater than that if he had carried out the agreement. Therefore, where a mortgagee agrees to accept a smaller sum than was due to him if paid before a certain date, but in case of delay the full amount payable under the mortgage deed would be realised, the latter stipulation is not a penalty³. The case in illustration (f) relates to a mere acceleration and not to the exaction of any extra amount by way of penalty, whereas in illustration (g) the borrower not only has the payment accelerated, but he is to pay upon it the interest which was properly due only upon the loan if it had run its full course⁴. A stipulation by which on default of payment of one instalment double the entire amount of the debt is to become at once payable is of the nature of a penalty because of the enhancing of the amount⁵, but not if only the debt due is to become payable⁶. Similarly, a stipulation that on failure to pay any instalment under a decree by the due date the judgment-debtor will be liable to pay up the whole of the decretal amount is not a penalty⁷. A stipulation in a *chit* fund that the whole of the future instalments would become due in default of payment of any one of them is not a penalty⁸. Where a bond is payable in instalments and some instalments irregularly paid are accepted, on a fresh default the plaintiff is held entitled to sue for the recovery of the balance due upon the bond with interest provided therein⁹. Where a judgment-debtor makes default in the payment of an instalment as provided in a consent decree containing a forfeiture clause, but a payment is made after the due date and

1 *Raghunanda v. Ghulam*, 46 A 571

2 *Wallingford v. Director of Mutual Society*, 5 AC 685

3 *Sheo Prasad v. Sanauallah*, 115 IC 639; *Ramalinga v. Meenakshisundaram*, 85 IC 261; see *Re Neil*, 16 Ch D 675 44 LT 525; *Kishen Prasad v. Kunj Behari*, 91 IC 790; *Popular Bank v. Cherann*, 1947 A 136

4 *Venna v. Kakarla*, 105 IC 789 distinguishing *Ramalinga v. Meenakshisundaram*, 85 IC 261.

5 *Joshi v. Kali*, 12 B 555. referring to *Sterne v. Beck*, 1 DGI&S (595); *Protector Endowment Loan Co. v. Grice*, 5 QBD 592

6 *Tatayya v. Gangajaya*, 53 MLJ 562; *Hotchand v. Premchand*, 131 IC 710; *Jwalaram v. Mathradas*, 132 IC 580; *Jamir v. Ram*, 32 IC 697; *Sampat v. Chango*, 10 IC 738.

7 *Mohiuddin v. Kashmiro*, 55 A 334 FB.

8 *Ayyakannu v. Doraiswami*, 145 IC 1008; *Ramalinga v. Meenakshi*, 47 MLJ 833, 836; but see *Subbiah v. Shanmugham*, 108 IC 319; see also *Purshottam v. Sahu*, 91 IC 295; but see *Bhagwansa v. Amin*, 65 IC 963.

9 *Ramdhani v. Lalit*, 5 ALJ 609; *Belaji v. Sakharani*, 17 B 555.

accepted by the decreeholder, the judgment-debtor is relieved against forfeiture¹⁰. Where a bond is payable in instalments without interest, but with a condition that if the instalments are not paid regularly interest will be charged, acceptance after the due date is sufficient evidence of the waiver, but the payment must be of the specific instalments in arrears. A mere payment on account generally will not suffice¹¹. A claim to enforce a condition entitling a creditor to recover the whole amount due under a bond by reason of default in payment of one instalment is barred under Article 75 after 6 years from the date of the payment of the last instalment¹². Instalments payable under a decree become barred if no application for execution be made within 3 years from the date on which any one instalment falls due and is not paid¹³. A provision for the enhancement of the rate of interest from 12 p.c., to 75 p.c. on default in its payment for 3 successive months has been regarded as not penal¹⁴.

75. Party rightfully rescinding contract entitled to compensation.—A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

The section.—When a contract is rescinded under S. 39, the party rescinding the contract must restore any benefit that he may have received thereunder (S. 64) and may be called upon to make any compensation to the other party which justice may require (S. 38 Sp. Rf Act). Under this section he is entitled to compensation for any damage he may have sustained through the non-fulfilment of the contract. The proper measure of compensation payable to a party on breach of a contract is to be determined under Ss. 74 and 75¹⁵. As to rescission in case of reciprocal promises, see Ss. 53 and 54, and in case where time is of the essence of the contract, see S. 55.

¹⁰ *Narayan v. Rajimal*, 27 Bom LR 1453, but see *Raghunath v. Narayan*, 28 Bom LR 543; see also *Subraya v. Sombaya*, 20 Bom LR 335; *Deepchand v. Ticamchand*, AIR 1974 Cal 222.

¹¹ *Wizarat v. Mohan Lal*, 43 A 38.

¹² *Amolak v. Baijnath*, 35 A 455.

¹³ *Dulsook v. Chuhgon*, 2 B 356.

¹⁴ *Chuni v. Munna*, 131 IC 368.

¹⁵ *Shaguwandas v. Secretary of State*, 49 B 194, a case under Indian Forest Act, 7 of 1878, S. 84 of which provides for payment of the whole amount mentioned in a bond on breach of conditions mentioned therein.

If either party to a contract rightfully rescinds it, he is entitled under the section to compensation for any damage which he has sustained through its non-fulfilment¹⁶. Where damages are claimed under this section the person who rescinds a contract must be entitled to compensation for the damage which he has actually sustained through the non-fulfilment of the contract before the court can award him damages for the breach of the contract¹⁷.

¹⁶ *Kurupamaya v. Seesil*, 49 IC 811.

¹⁷ *Keshav v. Gandhi*, 29 IC 952.

CHAPTER VII

[*Sections 76-123. Sale of Goods.*] *Repealed,*
Act III of 1930, s. 65.

Chapter VII, comprising sections, 76-123, is repealed by the Sale of Goods Act (III of 1930), section 65.

CHAPTER VIII

OF INDEMNITY AND GUARANTEE

124. "Contract of indemnity" defined.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

Illustration

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

1. Contract of indemnity.—In English law the right of indemnity extends to the case of perfectly independent parties between whom there is no special relation arising out of contract. As has been observed in *Toplis v. Crane*¹, "when an act has been done by the plaintiff under the express directions of the defendant which occasions injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." The principle also applies to the case "when a person is requested to exercise a statutory duty for the benefit of the person making the request." In such a case "there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty"². A contract to pay a debt³ or discharge an existing encumbrance is a contract of indemnity⁴. A suit for breach of such a contract is governed by Art. 83⁵. A bond containing these words, "If the aforesaid person fails to pay the amount thereof, I will pay it in accordance with the bond", has been held to be a contract of indemnity⁶. In *Birkmyr v. Darnell*⁷ the distinction between a contract of guarantee and that of indemnity has been thus put: "If two come to a shop and one buys and the other, to gain his credit, promises the seller "If he does not pay you, I will", this is a collateral undertaking (contract

1 5 Bing N. C. 636, cited in *Dugdale v. Lovering*, LR 10 CP 196, 200 : (1874-80) All ER Rep 545, in *Sheffield Corpn. v. Barclay*, 1905 AC 392, 401, 399 : (1904-07) All ER Rep 747; *Kuppan v. Rama*, 1946 M 472.

2 *Sheffield Corpn. v. Barclay*, 1905 AC 392, 401, 399 : (1904-07) All ER Rep 747.

3 *Kumar v. Nobo*, 26 C 241.

4 *Ranganath v. Pachusao*, 156 IC 94.

5 *Kaliyammal v. Kolandavela*, 38 IC 188.

6 *Nandlal v. Surajmal*, 138 IC 879.

7 1 Sm. LC.

of guarantee) and void (unenforceable) without writing by the statute of frauds. But if he says, "Let him have the goods, I will be your paymaster," or "I will see you paid," this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act as but his servant." A contract of indemnity is assignable and is not a merely personal covenant⁸. The giving up and postponement of a right by a party implies a promise to indemnify him against any resulting loss⁹. The section does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents not depending upon the conduct of the indemnifier¹⁰.

2. **Contract of indemnity and of guarantee.**—A promise to be liable for a debt conditionally on the principal debtor making default is a guarantee. On the other hand, a promise to become liable for a debt whenever the person for whom the promise is made should become liable is a contract of indemnity. "There is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter into a contract of liability, indemnified against that liability independently of the question whether a third person makes default or not"¹¹. As has been said in *Harburg & Co. v. Martin*¹², "a promise of guarantee is a promise made to the person to whom another is already or is to become answerable." A contract of indemnity has no reference to the debt of another, but creates a new liability which is undertaken by the promisor. Contracts of guarantee, therefore, unlike contracts of indemnity, require the concurrence of three persons, namely, the principal debtor, the creditor and the surety. S. 126 refers to a contract of guarantee and speaks of three persons with reference to the contract¹³. Where there are only two parties to a document, the contract is one of indemnity¹⁴. As to the distinction between a contract of indemnity and a contract of guarantee, see *Punjab National Bank v. B. C. Mills*¹⁵.

3. **Right to indemnity of agents, etc.**—As to the liability of the principal to indemnify the agent, see secs. 222, 223, 224. As to indemnity by a trustee, see *Hardoon v. Belilios*¹⁶.

125. Rights of indemnity-holder when sued.—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in

⁸ *British Insurance & Co. v. Rawson*, (1916) 2 Ch 476.

⁹ *Re Chappell*, 16 QBD 305 : 55 LJ QB 721.

¹⁰ *Gajan v. Moreshwar*, 44 Bom LR 703.

¹¹ *Guild v. Conrad*, (1894) 2 QB 885, 895 : 63 LJ QB 721 : 71 LT 140 : 42 WR 642 : 10 TLR 549.

¹² (1902) 1 KB 778, 784.

¹³ *Periamanna v. Banians Co.*, 49 M 156.

¹⁴ *Municipal Committee v. Damodhar*, 1949 N 48 ; *Rani v. Shapurji*, 192 IC 375.

¹⁵ AIR 1970 SC 1973.

¹⁶ 1901 AC 118.

any suit in respect of any matter to which the promise to indemnify applies ;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

1. The section.—The section is not exhaustive. It does not set out all the reliefs which an indemnity-holder who has been used may get. It leaves untouched certain equitable reliefs which he may get¹⁷.

2. Sub-section (1).—Although the ordinary rule of law is that a judgment *in rem* is conclusive, but a judgment *inter partes* is conclusive only between the parties and the persons claiming under them, yet a judgment upon a contract of indemnity is conclusive¹⁸. Where there is a contract of indemnity, if a decree has been passed against the person entitled to indemnity, the correctness of that decree cannot be impeached by the person bound to indemnify. Courts have held that a contract of indemnity is sufficiently broken when the court has found in a suit honestly defended by the party entitled to indemnity that there has been a violation of duty by the indemnifier which has entitled a third party to the damages for which the indemnity has been given¹⁹.

3. Sub-section (2).—A surety who is called upon to discharge the debt or duty owing from the principal may well be justified in defending an action at the principal's expense. Therefore, in case of contracts of indemnity costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered²⁰; the costs of an appeal however have been disallowed¹. But the party indemnified cannot recover costs when he has not acted as a prudent man in defending the action against him, or has not been authorised by the indemnifier to defend the suit², or where the costs incurred have

17 *Profulla v. Gopee*, 1946 C 159; *Gajan v. Moreashwar*, 44 Bom LR 703.

18 *Parker v. Lewis*, LR 8 Ch 1035, 1059; *Alla v. Pala*, 1944 M 457.

19 *Nallappa v. Vridhachala* 37 M 270. fold in *Ramdhan v. Purushottam*, 88 IC 699, 703; *Ramaswami v. Kali*, 43 IC 124; see *Mercantile Investment Co. v. River Plate Trust*, (1894) 1 Ch 578; *Osman Jamal & Sons v. Gopal*, 56 C 262.

20 *Papin v. Chunder*, 5 C 811, see cases retd. to.; *Velugoti v. Sobhana*, 1944 M 211.

1 *Maxwell v. British T. & H. Co.*, (1904) 2 KB 342.

2 *Gopal v. Bhawanani*, 10 A 511.

been unreasonable in amount³. Under a contract of indemnity the party indemnified is entitled to recover from the indemnifier costs as between solicitor and client⁴. But in an English case⁵, he has been held entitled to costs incurred between himself and his own attorney, if he acted prudently in bringing or defending the action. Where the father as the guardian of his minor son sells any immovable property of the minor to P and executes an indemnity bond in favour of P and P is put in possession, P is not indemnified if the sale is set aside at the instance of the son so long as P remains in possession; he is, however, entitled to recover from the father the expenses incurred in protecting his possession. For instance if P in order to protect himself repurchases the property put up for sale in execution of a money decree obtained by a creditor of the son and also incurs expenses in defending the suit he can recover the amount paid as price and the expenses incurred in defending the creditor's suit from the father on the basis of the indemnity bond⁶.

4. Sub-section (3).—"The law with reference to express contracts of indemnity is that if a person has agreed to indemnify another against a particular claim or a particular demand and an action is brought on that demand, he may give notice to the person who has agreed to indemnify him to come in and defend the action and if he does not come in or refuses, he may then compromise at once on the best terms he can, then bring an action on the contract of indemnity⁷

5. Right to recover indemnity.—It is not necessary that the person indemnifying should have been compelled to make the payment. It is sufficient that a decree has been passed for such payment⁸. In *Osman Jamal & Sons v. Gopal*⁹, the plaintiff company before having actually made any payment to the vendor in respect of its liability to him was held entitled to recover from the indemnifier under the contract of indemnity "Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay." But the contrary view has also been maintained, namely, the indemnifier cannot be called on to make his promise until the indemnified has incurred actual loss by payment or transfer of property. The cause of action arises when the money is actually recovered from the indemnified. The payment which gives the surety the right of action against the principal debtor must be a payment of money or money's worth and not a mere liability to pay¹⁰. All

3 *Walker v Hatton*, 11 LJ Ex 361, 365.

4 *Venkataramayya v. Varaprasada*, 43 M 892.

5 *Howard v. Lovegrove*, LR 6 Ex 43 : 40 LJ Ex 13 : 23 LT 396.

6 *Ramaswami v. Muthukrishna*, AIR 1967 SC 359.

7 *Parker v. Lewis*, LR 8 Ch 1035, 1059; *Alla v. Pala*, 1944 M 457.

8 *Chiranjilal v. Narain*, 41 A 395, see discussion in *Bhavani v. Anantha*, 31 MLJ 356, *Churibhai v. Natha*, 1944 P 185

9 56 C 262; *Batcha v. Dawood*, 51 MLJ 203; *Rama v. Venkata*, 57 M 218; see *Wolmershausen v. Gullick*, (1893) 2 Ch 514, 528 : (1891-94) All ER Rep 740; *Profulla v. Gopee*, 1946 C 159.

10 *Ranganath v. Pachusao*, 156 IC 94; *Shiam v. Chandu*, 159 IC 853; *Pudi v. Marimuthu*, 26 M 322, fold in *Muruswamy v. Konar*, 14 B 511, distinct from *Srinivas v. Shankarrao*, 32 Bom LR 207; *Chand Bibee v. Sankar*, 1933 C 641.

damages which the promisee may be compelled to pay do not mean all damages which he is compellable to pay. The amount which can be recovered under the section is the amount which has been paid, whether under compulsion of an adjudication or under the terms of a proper compromise of the suit. The measure of damages is the extent to which the surety has been damnified, and not the benefit derived by the persons for whom he stood surety. The section makes a distinction between a contested suit in which the promisee has been compelled to pay damages and costs by order of the court and a suit which is properly compromised and in pursuance of which compromise money has been paid¹¹. The assignor of a lease has a right to an indemnity from the assignee in respect of the rent payable to the landlord. He will be entitled not merely to recover the rent from the assignee if he himself has actually paid it to the landlord, but will also be entitled to an "anticipatory remedy", i.e., to protect himself against the consequences of being called upon by the landholder to pay. Unless the assignor has actually paid the rent, he will not be entitled to sue for payment of the money to himself¹². A suit will not lie on a contract of indemnity when the original agreement is illegal (such as a champertous agreement is under the English law)¹³. Where a sum of money is left with the buyer to be paid to the mortgagee, on default by the buyer in the payment of the amount, the vendor is entitled to have it refunded to him and it can, therefore, be looked upon as a debt due to the vendor¹⁴. The transaction may assume one of three forms : (i) the amount left in the hands of the vendee may be a part of the purchase money remaining unpaid in which case it is obviously money belonging to the vendor and is due to be paid to the vendor ; (ii) or, it may amount to a covenant with an undertaking to relieve the vendor from his existing liability, in which case a suit on the covenant will lie ; (iii) or, it may be a mere promise to perform an act for a consideration, or a contract of indemnity, in which case a suit for damages incurred on the breach of the contract will lie under this section, but it must be proved that the loss has been sustained¹⁵. As has been observed by the Privy Council : "If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. If the encumbrances turn out to be invalid, the vendor has nothing to complain of"¹⁶. The cause of action for breach of such a covenant arises when the plaintiff vendor is actually damnified by the sale of the property by the mortgagee¹⁷.

11 *Anwar v. Gulam*, 50 IC 611, a suit by a surety is said to be premature when the surety has made no payment, but see above case ; *Alla v. Pala*, 1944 M 457.

12 *Rajagopala v. Venkata*, 157 IC 1005.

13 *Haseldine v. Hosken*, (1933) 1 KB 822 · (1933) All ER Rep 1.

14 *Bahadur v. Bahadur*, 152 IC 645, *Raghunatha v. Sadagopa*, 12 IC 353, *fold* ; see *Dwarika v. Priya*, 36 IC 792 ; *Humala v. Ori*, 155 IC 550.

15 *Nafina v. Basant*, 149 IC 781 PC ; *Tilak v. Surat*, 1938 All 500 ; but see *Kashwar v. Guri*, 17 Pat 338 ; *Mehdat v. Halimat*, 1939 P 194 ; *Mohammad v. Mohammad*, 1939 A 289.

16 *Indumuniasa v. Pirtab*, 31 A 583 PC.

17 *Mehdat v. Halimat*, 17 Pat 781.

6. Rights of the indemnifier.—"It is a well-known principle of law that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss"¹⁸. The Act in S. 141 applies this principle to the contract of suretyship, but Ss. 124 and 125, which deal with the contract of indemnity, are silent on this point. Only the rights of the promisees are stated; those of the promisors are not mentioned. They are an essential part of the law of indemnity and clearly based on natural equity and are thus of general application. The Act does not impair those rights¹⁹. A contract of insurance is a contract of indemnity²⁰. It follows that if the assured saves anything upon the loss the salvage must go to the underwriter, otherwise the assured would be more than indemnified¹. A payment honestly made by insurers, in consequence of a policy granted by them in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured². The assured by any contract with a third party cannot deprive the insurers of this right³.

7. Limitation.—The cause of action arises when the damage is suffered. Any suit brought before the actual loss has accrued will be dismissed as premature. See Art. 83, Limitation Act, 1908⁴.

126. "Contract of guarantee," "surety," "principal debtor," and "creditor."—A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

1. The section.—A contract of guarantee implies the existence of the liability, actual or prospective, of a third party. Such a contract is therefore a collateral undertaking given by way of additional security to the creditor by the surety at the request of the third party. If the third party be not primarily liable the contract is not one of guarantee. The guarantee may

18 *Simson v. Thomson*, 3 AC 279, 284; see *King v. Victoria Insurance Co.*, 1896 AC 250.

19 *Maharana Jasvatsingji v. Secretary of State*, 14 B 299, 303.

20 *Darrell v. Tibbits*, 5 QBD 560; see *Periamanna v. Banians & Co.*, 49 M 156.

1 *Dane v. Mortgage Insurance Corpn.*, (1894) 1QB 54, 61; *Castellain v. Preston*, 11 QBD 380; (1881-85) All ER Rep 493.

2 *King v. Victoria Insurance Co.*, 1896 AC 250; cf. Ss. 140, 141.

3 *Phoenix Assurance Co. v. Spooner*, (1905) 2 KB 753, the position of an indemnifier is similar to that of a surety.

4 *Shiam v. Chandu*, 159 IC 853; *Shankar v. Laxman*, 1940 B 161.

be a fidelity guarantee i.e., an agreement guaranteeing the employer against the misconduct of the employee or a guarantee to answer for the debt or default of another.

Where a transaction between the same parties is contained in more than one document, they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document⁵.

2. Contract of guarantee.—If a debtor transfers his property to a trustee and direct him to pay off his debts, but the trustee does not undertake any personal liability to the creditors, the relationship of principal and surety is not constituted between the trustee and the debtor⁶. Where a proceeding in execution of a decree was compromised by the judgment debtor giving security and the contract of suretyship provided that the judgment debtor should be liable personally to perform the decree, if he failed to fulfil his obligation the decreeholder would be able to realise the money from the surety, the contract amounted to a contract of guarantee and under S. 145 execution could be levied against the surety. It is not necessary that the contract should be in the form of a security bond or in writing or in favour of court⁷. A money bond conditioned for the performance of the contract by the contractors is a contract of guarantee⁸. Under a contract of guarantee for such goods as the principal debtor may require and the creditor may supply, the guarantee operates if the goods are supplied, and if the goods are not supplied the guarantee is not binding. There is no binding agreement therefore to supply goods⁹. A enters into a contract with B, C without any connection with B undertakes to indemnify A against any loss on that contract for a consideration moving from A. Loss occurs by B breaking the contract and C is obliged to make good that loss under his agreement with A. This is contract of indemnity. The question has been raised, can C, in such a case, sue B for damages in his own name? The Act draws a distinction between contracts of indemnity and contracts of suretyship. Reading Ss. 126 and 145 together it appears that there can be no contract of guarantee, as distinguished from a contract of indemnity, unless there is privity between the principal debtor and the surety. No difference was intended to be made in the Act between the Indian and the English law on the subject, there is no reason to depart from the English law as to the necessity of a request actual or constructive, from the principal debtor to the surety in order that there may be an effective contract of suretyship [see S. 127 illustration (c)]. So far as a contract of indemnity is concerned, by which a person agrees to indemnify another against loss caused by the conduct of a third person, and which does not require the consent of, or privity with, the third person the person who indemnifies can, on payment or discharge of the obligation, sue, but the suit in the absence of any assignment can only be in the name of the promisee. There is no subrogation

5 *Chattanatha v. Central Bank of India*, AIR 1965 SC 1856.

6 *Arunachellam v. Subramanian*, 30 M 235.

7 *Joyma Bewa v. Easin*, 53 C 515, fold in *Karuppan v. Nagappa*, 57 M 688.

8 *Trade I. Corpn. v. W. H. & D. Co.*, 1937 AC 1 : (1936) 1 All ER 454.

9 *Westhead v. Sproson*, 30 LJ Ex 265 : 158 ER 301 : 6 H&N 728 : 4 LT 408 : 9 WR 695.

in law as in the case of a surety who undertakes the obligation at the request of the promisor. Therefore, in case of a mere indemnity a direct right of action on the original contract is not given to the person who indemnifies against the person whose conduct has caused loss. So far as the Indian law is concerned there is nothing which gives any higher rights to a person under a contract of indemnity as distinguished from a contract of guarantee¹⁰. The contract of guarantee is confined to cases where the guarantor agrees with the creditor to discharge the liability of a third person in case of his default. Cases where on the face of the contract two persons are both jointly and severally liable do not fall within the definition. In other words, the contract of guarantee as defined in the section is confined to cases of suretyship strictly so called¹¹. When a person signs on the back of a negotiable instrument, oral evidence is admissible to prove that he signed as a guarantor¹². The conditions required for a contract of suretyship are : (i) there must be a creditor, (ii) a principal debtor, (iii) a guarantor or surety who makes himself liable for the liability of the principal debtor. The relationship may be established by an agreement between the principal debtor and the surety to which the creditor is a party as contemplated by the section. It may also be established by an agreement to which the creditor is not a party, when there is a collateral contract between the surety and the principal debtor that one of them shall be liable on the default of the other (see S. 132). But when the contract between the surety and the creditor is not a collateral undertaking but creates an original liability as between those parties, then the contract is not one of surety but one of indemnity under S. 124. In a sense every contract of indemnity is a contract of guarantee¹³. For a contract of suretyship there should be the concurrence of the principal debtor, the creditor and the surety, but this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor. An implied request will be quite sufficient¹⁴. Where a person writes to a creditor that he will be responsible for the payment of the debt due to the creditor from another person, the writer stands in the position of a principal debtor and not of a surety¹⁵. A contract of guarantee as defined in the section presupposes the existence of a principal debtor. A custom whereby brokers collect money from purchasers and pay the same to the vendors is a custom of convenience and can in no sense make the broker a surety¹⁶. A contract of service providing that future increase in salary would be proportioned to the increase of business is not a contract of guarantee¹⁷.

10 *Periamanna v. Banians & Co.*, 49 M 156 (see as to the nature of contract of insurance); *Jagannath v. Chandra*, 165 IC 370.

11 *Vyavan v. Official Assignee, Madras*, 55 M 949.

12 *Thakursey v. Kishendas*, 76 IC 282.

13 *Mahabir v. Siri*, 46 IC 27; see *Harburg Co. v. Martin*, (1902) 1 KB 778 : 86 LT 505 : 18 TLR 428.

14 *Jagannath v. Chandra*, 165 IC 370.

15 *Liquidator v. Debi*, 1937 P 410.

16 *Muthammad v. Balaji*, 148 IC 585.

17 *Prem v. F. I. Assce*, 1939 L 509.

A stranger offering a cheque in satisfaction of the claim of a decreeholder who has attached the judgment debtor's property is not a surety for the judgment debtor. The stranger cannot take advantage of S. 134. The consideration for the payment by the stranger consists in the decreeholder not insisting on attachment¹⁸.

It has been stated that contracts of guarantee may be of three kinds :

(i) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party ; (ii) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger (see S. 132) ; and (iii) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being as between the two, that of one of those persons only and not equally of both ; in such a case equity is in favour of the suretydebtor¹⁹.

A contract of guarantee may be created either by parol or by a written instrument. A contract of guarantee may be tacit or implied and may be inferred from the course of conduct of the parties concerned. If it be in writing the surety is bound according to the proper meaning and effect of the written engagement that he has entered into²⁰. Such a contract is to be proved strictly¹. Where a surety undertakes to pay a higher rate of interest in consideration of the creditor giving time to the principal debtor, the promise is made by the surety not in his position of surety, because the principal debtor is no party to the agreement (see S. 126), but the surety is personally liable for the amount². When on a promissory note signed by the principal debtor the second defendant signs an endorsement, "Repayment guaranteed by me", this is a contract of guarantee by the second defendant³. A debt incurred by the father as surety for the repayment of a loan is recoverable on his death from his assets in the hands of his son under the general principles of Hindu law⁴, but the son is not bound to pay debts incurred by the father by being surety for the appearance or for the honesty of another⁵. A Hindu son or grandson governed by the Mitakshara law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money which comes within the meaning of *vyavasthita*, which has been translated as lawful, useful or customary, unless the debt is either illegal or immoral⁶. The test of fitness of a surety is not laid down in this Act or in any other Act,

18 *Karan v. Anant*, 1941 Pesh 6.

19 *Duncan Fox & Co. v. N. & S. W. Bank*, 6 AC 1, 11, 12, see cases refd. to.

20 *Mathura v. Secretary of State*, 28 ALJ 1217 ; *Nandlal v. Kishinchand*, 168 IC 222.

1 *Janki v. Dhokar*, 156 IC 200.

2 *Baijnath v. Misri Lal*, 28 ALJ 1181.

3 *Brajendra v. Hindusthan Insurance Society*, 44 C 978.

4 *Sitaramayya v. Venkataramanna*, 11 M 373.

5 *Tukaram v. Gangaram*, 23 B 454 ; *Gobind v. Hayagraba*, 138 IC 414, see as to the four classes of surety debts refd. to by Vrihaspati.

6 *Balkrishna v. Sham*, 56 IC 962.

the matter comes up for discussion more frequently in criminal cases. The test is whether the surety is a person of sufficient substance to warrant his being accepted⁷, and also whether he will be able to exercise control over the accused. A surety in the eye of the law is a favoured debtor. In a surety bond the operative part of the guarantee is liable to be controlled by the recitals, where the latter are plainly inconsistent with the former, but not otherwise⁸. A surety is a favoured creditor. He can insist on a rigid adherence to the terms of his obligations by the creditor. Though his contract is not like that of an insurer *uberrimae fidae*, it is one *strictissimi juris*⁹. Surety bonds have to be strictly construed. Where a surety bond agrees to pay the amount withdrawn by the decreeholder if the defendants succeed in the appeal, the surety is not liable if only one of the defendants succeeds in the appeal¹⁰.

Under the law the guarantor cannot be made liable for more than he has undertaken. It is often said that a surety is a favoured debtor. See, for example *Pratapsing Moholalbhai v. Keshavlal Harilal Setalvad*¹¹ and *M. S. Anirudhan v. Thomco's Bank Ltd.*¹² To this there are some exceptions. In case of ambiguity when all other rules of construction fail, the courts interpret the guarantee *contra preferentem*, that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement¹³.

3. Liability.—The word “liability” in the section means an existing liability, one which is enforceable in law, and if that liability does not exist there cannot be a contract of guarantee. Therefore, there is no valid contract of guarantee which is given in respect of a debt which has become barred¹⁴. As has been observed, “The law of contract gives you, as a foundation, that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of the principal contract, the contract of suretyship would fail”¹⁵.

127. Consideration for guarantee.—Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

7 *Adam v. Emperor*, 35 C 400.

8 *Bir v. Jadab*, 40 CWN 245.

9 *Motilal v. Akar*, 1939 B 309.

10 *Chaganti v. Mallam*, 1939 M 932.

11 AIR 1935 PC 21, 24.

12 AIR 1963 SC 746, 752.

13 *State of Maharashtra v. M. N. Kaul*, AIR 1967 SC 1634, 1636.

14 *Manju v. Shivappa*, 42 B 444.

15 *Mountstephan v. Lakeman*, LR 7 QB 196, 202.

Illustrations

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

1. Consideration for guarantee.—A contract of guarantee, like any other contract, requires consideration in the sense of the term as defined in S. 2 (d). It may consist in the fact of the creditor having done an act as set out in illust. (a) or in forbearing to do something as stated in illust. (b). Forbearing to execute a decree against a debtor is a good consideration for a contract of guarantee¹⁶. Thus it has been observed, "I take it to be undoubted law that the mere fact of forbearance would not be a consideration for a person becoming a surety for a debt. It is quite clear, on the other hand, that a binding promise to forbear would be a good consideration for a guarantee"¹⁷. In illustration (c) the agreement is void because there is no consideration, the promise of the surety is gratuitous. One may look at the surrounding circumstances in order to determine the intention of the parties to a contract of guarantee¹⁸. One may intervene to guarantee a debt which has been incurred by a friend, but it cannot be inferred from this fact that one has originally guaranteed the performance by him of the contract which has, in fact, given rise to the debt. Such a contract of guarantee may even be invalid as in illust. (c)¹⁹. But a security bond executed for payment by the buyer of the sum of money, retained by him out of the purchase money, to a creditor of the seller is for good consideration²⁰. A contract of suretyship, though distinct from the main contract, would fail if the main contract were to fail, e.g., for want of consideration¹.

There must be good consideration for a contract of guarantee². The consideration for a contract of suretyship is the money lent to the principal debtor on the faith of the guarantee³. Where a surety definitely asks the creditor to advance money to the debtor, the performance of the condition would in itself amount to an acceptance of the proposal and the contract of guarantee is completed by the advance being made to the debtor⁴. Any-

16 *Narain v. Mata*, 1887 A.W.N. 52.

17 *Crears v. Hunter*, LR 19 QB 341, Cited in *Jagadindra v. Chandra*, 31 C 242, 248.

18 *Montefiore v. Lloyd*, 33 LJCP 4.

19 *Janki v. Dhokar*, 156 IC 200.

20 *Ahmad v. Raihan*, 148 IC 639.

1 *Bhumbho v. D. L.*, 1940 S 199.

2 *Barrell v. Trussell*, 4 Taunt 117.

3 *Chokalinga v. Dandayuthapani*, 113 IC 337.

4 *Rangaram v. Raghbir*, 113 IC 780.

thing done or any promise made for the benefit of the principal may be a sufficient consideration to a surety for giving a guarantee⁵. The word 'done' shows that past benefit to the principal debtor may be good consideration for a bond of guarantee. It is not necessary that the promise or the thing done should be at the desire of the promisor⁶. Forbearance may constitute a good consideration for a contract of guarantee. A request for forbearance by the guarantor, followed by actual forbearance by the creditor, binds the guarantor⁷. If the debt contracted be illegal the contract of guarantee is void⁸. But where an agreement was *ultra vires*, therefore unenforceable against a company, a guarantee given in respect of the agreement was held binding⁹. A surety who guarantees the performance of an agreement without consideration is not bound by his guarantee, though the principal debtor may be bound. Therefore, where there is not anything done or suffered or any promise made for the benefit of the principal debtor there is no consideration for any contract of guarantee¹⁰. Value received by the principal debtor is sufficient consideration to bind the surety, S. 128 makes his liability co-extensive with that of the principal debtor¹¹. It is not necessary therefore that consideration should be received by the surety¹². But a contract of guarantee without any consideration whatever cannot be enforced¹³. The rule of law is firmly established that total failure of the consideration for the surety's promise of guarantee has the effect of discharging him¹⁴.

The mere fact that a person recommends certain advances to be made to another and they are made accordingly is not sufficient consideration in law for a subsequent promise by him guaranteeing their payment¹⁵. Because the father is willing to help his son, or on an occasion pays a certain sum to the creditors, it cannot be inferred that he is prepared to be a guarantor¹⁶. Where a surety gave a guarantee for payment of the judgment debt in consideration of the judgment creditors consenting to postpone the sale under the execution, but the sale could not be stopped by them, the consideration having failed, the guarantee was at end¹⁷. The consideration for a surety bond executed on behalf of the certificate debtor at the instance of the certificate officer is not illegal¹⁸. Where a debtor borrowed money

5 *Kali v. Abdul*, 23 CWN 545 PC.

6 *Ghulam v. Faiyaz*, 1940 O 346.

7 *Wynne v. Hughes*, 21 WR 628; *Crears v. Hunter*, 19 QBD 341, cited in *Jagadindra v. Chandra*, 31 C 242, 248; *Andilaxamana v. Raghurami*, AIR 1970 AP 158.

8 *Swan v. Bank of Scotland*, 10 Bli 638 : 6 ER 231 HL.

9 *Garrard v. James*, (1925) 1 Ch 616; *Yorkshire Ry. Wagon Co. v. Maclure*, 19 Ch D 478.

10 *Pestonji v. Bai Meherbai*, 30 Bom LR 1407, 1420.

11 *Sornalinga v. Pachai*, 38 M 680.

12 *Pestonji v. Bai Meherbai*, 30 Bom LR 1407, 1420.

13 *Ram v. Saheb Jan*, 33 IC 732.

14 *Gurdas v. Guranditta*, 119 IC 485.

15 *Muthukaruppa v. Kathappudayan*, 27 MLJ 249.

16 *Jagannath v. Khetra*, 59 CLJ 511.

17 *Cooper v. Joel*, 1 DF & J 240; see *Het Ram v. Debi Prasad*, 1881 AWN 2.

18 *Dist. Board v. Chandra*, 1937 C 625.

and gave a bond naming a surety therein, the surety, however, was no party to the instrument but entered into a separate engagement subsequently, held the creditor did not do or promise to do anything for the benefit of the principal debtor. The surety acted not for the benefit of the principal debtor but as surety for the benefit of the lender. The subsequent suretyship agreement, therefore, was without consideration i.e., a *nudum pactum*¹⁹.

128. Surety's liability.—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

1. The section.—The section is a mere re-enactment of the English common law²⁰. The section states the quantum of a surety's obligation when the terms of the contract do not limit it as they often do. It does not refer to the nature of the obligation of the principal¹. While by the section the liability of the surety is co-extensive with that of the principal debtor, it only extends to the liability on the contract guaranteed and not on something different². When fresh surety is taken, his liability commences from the date of his surety bond³. The section has no application to the case of a surety executing a bond for the attendance of an accused person⁴. S. 145, C. P. C., must be read along with this section⁵.

2. Extent of surety's liability.—The liability of the surety is co-extensive with that of the principal debtor except in so far as the contract may otherwise provide. It does not, however, follow that a surety can never be liable when the principal debtor cannot be held liable. The creditor can fall back on the contract of indemnity and enforce the liability of the surety if the contract entered into by the principal debtor is found to be, for any reason, void or voidable⁶. The liability of the surety is not deferred until the creditor exhausts his remedies against the principal debtor. In the absence of some special equity the surety has no right to restrain an action against him on the ground that the principal debtor is solvent or that the creditor may have relief against the principal debtor in some other proceedings. Likewise

19 *Nanak Ram v. Mehin*, 1 A 487.

20 *Hajarimal v. Krishnarav*, 5 B 647, 650.

1 *Sohan Lal v. Puran Singh*, 35 IC 537; see *Brajendra v. Hindusthan Co-operative Society*, 44 C 978.

2 *Pratapsingh v. Keshavlal*, 59 B 180 PC.

3 *Sonepat Co-operative Society v. Kapuri*, 16 L 583.

4 *Abdul v. Emperor*, 1933 S 320.

5 *Gokul v. Lakshmi*, 1933 N 287.

6 *Ganga v. Hayat*, 52 IC 88; *Bharat N. Bank v. Thakar*, 16 L 757. See S. 127 n. 1; see *Garrard v. James*, 1925 Ch 616; cited ante; *Subhan v. Lal*, 1948 N 123; *Kuckreja v. Alam*, 1941 L 16.

where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal⁷. A contract of guarantee has to be strictly construed as to the point of time when the liability of the surety arises⁸. A surety to a bond passed by a minor is liable⁹, so is also a surety to an administrator though the letters of administration have been revoked on the ground that they were obtained by fraudulent misrepresentation. Where a surety guarantees the purchaser of property of a minor against the minor disputing the sale on attaining age, the surety is not liable if the sale falls through because the sale deed is not registered and so is inoperative¹⁰. Where sureties represent to the plaintiff that the principal debtor is competent to contract and make the plaintiff enter into a contract with the principal debtor, agreeing to compensate him if their representations prove false, the sureties must compensate the plaintiff¹¹. The liability of a surety does not necessarily in all cases arise simultaneously with that of principal. Their liabilities are distinct. It often happens that the remedy against the principal is barred when the liability of the surety arises. The question depends on the terms of the contract of guarantee by which the surety has bound himself. The section only defines the measure of liability and has no reference to its extinction by the operation of the statute of limitation¹². A surety would be liable where he had expressly contracted to remain liable notwithstanding the discharge of the principal debtor¹³. Where the original agreement is void the surety is liable as a principal debtor¹⁴. A surety's liability does not arise where the work is not done in accordance with the agreement, for the principal is not liable in such a case¹⁵. A surety is not liable to account for mesne profits where the bond makes no mention of them, as it must be strictly construed¹⁶. There is nothing to prevent a surety from limiting his liability or making it contingent upon some event other than the default of the principal debtor in payment of the debt. The right of action against a surety will generally arise at the same time as the right of action against the principal debtor¹⁷. Thus, by a contract between the creditor and the surety, the right of the former to proceed against the latter may be postponed until the former has taken steps to recover the debt by first proceeding against the principal debtor¹⁸. The surety of a receiver is answerable to the extent of the amount of recognizance for whatever sum of money, whether principal, interest, or costs, the receiver

7 *Bank of Bihar v. Damodar Prasad*, AIR 1969 SC 297.

8 *Subhan v. Lal*, 1948 N 123.

9 *Kashiba v. Shirpat*, 19 B 697; *Sohan v. Puran*, 35 IC 537.

10 *Debendra v. Administrator General*, 35 IA 109; *Sarat v. Rajoni*, 12 CWN 481, case under the Guardians and Wards Act; *Krishna v. Apparao*, 1950 M 179.

11 *Tikki v. Komal*, 1940 N 327.

12 *Charu v. Faithful*, 53 IC 999.

13 *Ayyar v. T. N. Bank*, 1940 M 437.

14 *Chhajju v. Emperor*, 63 IC 454; *Garrard v. James*, (1925) 1 Ch 616.

15 *Eshelby v. Federated European Bank*, (1932) 1 KB 423; (1931) All ER Rep 840.

16 *Mayandi v. Raman*, 1937 R 499.

17 *Kaloo v. Sunderabi*, 95 IC 707.

18 *Radha v. Ajodhia*, 1937 ALJ 1265.

has been liable, including the costs of his removal and the appointment of a new receiver in his place⁹. Where sureties guaranteed a payment of a part of a debt, the exact limit being prescribed, and the creditor was enabled upto that point to retain as against the guarantor dividends received in the bankruptcy of the principal debtor, it was held on a construction of the guarantee that the creditor was not bound to exhaust his remedies against the principal debtor before proceeding on the guarantee¹⁰. Where a surety guaranteed payment by the executants of a promissory note by a particular date and on failure promised to execute a fresh note, on the failure of the surety to execute a fresh note he was held liable to pay on the old one. Where money was deposited as security on condition that if the judgment debtor's application for declaration of insolvency was dismissed for any reason, the money would be paid to the decreeholder and the judgment-debtor died before his application could be disposed of, as the application of the judgment-debtor was not rejected the condition was not complied with, the decreeholder was not entitled to the money deposited¹. Where a surety undertakes to produce the accused on certain dates in a certain place he does not incur a forfeiture of the bond if he fails to produce the accused on a subsequent date and at a different place². Security given pending the disposal of the case means that the sureties are to remain liable until the disposal of the suit by final orders in it³. Surety for overdraft and dues of a customer is liable on account stated where the account submitted has been signed by the principal debtor but not by him⁴. The language of a security bond cannot be strained to include an appeal or embrace a contingency not referred to in the bond⁵. Where it has been stipulated that the surety "shall pay on demand" he is chargeable only after demand has been made⁶, so also where the surety's liability is dependent on notice being given⁷. On the construction of a security bond given in a mortgage suit it was held not to be an absolute security which the decree-holders were free to realise immediately on obtaining the decree but was a security for the balance of a sum, if any, remaining unpaid after the mortgage property was realised⁸. The test to determine whether a suretyship is for payment or for honesty is whether the act gives rise to a liability of a civil nature on the one hand, or of a tortious or criminal nature on the other. Any liability incurred by a surety in consequence of the dishonesty of the principal debtor cannot be enforced against his widow⁹. Under a continuing guarantee for the due performance of his duties by the principal debtor, the burden is upon the creditor to

⁹ *Rashmani v. Baroda*, 20 CLJ 123, 127.

¹⁰ *Mitchell v. Phillips*, 61 MLJ 186; *C. T. Firm v. Aye*, 1937 R 197.

¹ *Ashiq Ali v. Moti Lal*, 4 ALJ 437.

² *Basudeb v. Emperor*, 38 CWN 804; *Mohammad v. Hussain*, 1939 M 933.

³ *Manackjee v. Chettiar Firm*, 5 R 496, fold in *Lekhuram v. Sain*, 8 R 192.

⁴ *Benaras Bank v. Masudan*, 1936 P 444.

⁵ *Parama v. Rama*, 1939 M 152.

⁶ *Sicklemore v. Thistleton*, 6 M&S 9 : (1814-23) All ER Rep 355.

⁷ *Eshelby v. Federated Bank*, (1932) IKB 423 : (1931) All ER Rep 840.

⁸ *Raja Raghunandan v. Raja Kirtyanand*, 63 MLJ 85 PC.

⁹ *Sadasheo v. Sadashiv*, 1933 N 162.

prove that the principal debtor was guilty of such lack of diligence and faithfulness as caused a loss to the company and thereby constituted a breach of the agreement of guarantee. There is no breach of this agreement if the principal debtor be practically uneducated and wholly unsuited for the task in which he is engaged¹⁰.

The section makes it clear that the extent of the surety's liability cannot be greater than that of the principal debtor¹¹, but by contract it may be less, e.g., where a surety guarantees a limited portion of a debt. This contract may assume one of two forms. The surety may stipulate "I will be liable for £250 of the amount which A. B shall owe you," or, "I will be liable for the amount which A. B shall owe you, subject to this limitation that I shall not be called upon to pay more than £250"¹². The liability of a surety is co-extensive with that of the principal debtor; this implies that the surety's liability must not be extended to his detriment. A managing partner executing surety bond on behalf of a firm binds the firm. A non agriculturist surety is not liable for the entire debt when the principal debt has been scaled down by the Madras Agriculturists' Relief Act¹³.

Where the whole of a debt due on a banking account was guaranteed with a limitation as to the amount on the insolvency of the principal debtor, it was held that the bank could prove for the whole amount in insolvency¹⁴. A person, who guarantees a limited portion of a debt, if he pays that portion, has all the rights of a creditor and is entitled to receive the dividend which the principal debtor pays in respect of this part¹⁵. Where, however, the guarantee is in respect of the whole debt, though with a limit as to amount, the surety is liable to the extent of that limit without any deduction for dividends that may have been paid by the principal debtor¹⁶.

The surety in an action against the creditor can claim a set-off against the creditor's demand¹⁷. The liability of the principal debtor to indemnify the surety is limited to the amount which the surety is bound to pay at the date of suit instituted by the creditor against the surety. The liability of the principal debtor is not affected by a compromise under which the surety undertakes to pay the creditor compound interest¹⁸. The fact that by the operation of law the liability of the principal debtor is limited to the estate in her hands does not in any way affect the liability of the surety under a contract of guarantee¹⁹. The liability of the surety is determined by the surety bond and is not limited to amount reduced by the Debt Relief

10 *Balthazar v. James*, 167 IC 292.

11 *Ali v. Emperor*, 11 IC 588.

12 See *Hobson v. Bass*, LR 6 Ch 792, 794.

13 *Suwalal v. Fazle*, 179 IC 771; *Subramania v. Manian*, 1951 M 48 FB : (1950) 2 MLJ 694 (overruling *Subramanian v. Batcha*, (1941) 2 MLJ 751 : 1942 M 145).

14 *Re Rees*, 17 Ch D 98.

15 *Hobson v. Bass*, LR 6 Ch 792; *Gray v. Seckham*, LR 7 Ch 680.

16 *Re Sass*, (1896) 2 QB 12.

17 *Murphy v. Glass*, LR 2 PC 408.

18 *Anand v. Collector of Bijoor*, 30 ALJ 868; *People's Bank v. Nanik*, 185 IC 573.

19 *Pestonji v. Meherbai*, 112 IC 740.

Court²⁰. The surety for the faithful discharge by his son of the duties of a *Khazanchi* to a bank is not determined by the employee's death¹. The principle laid down in the section has no application to the case of a bond executed by an accused person and a surety, as from the wording of the bond it is clear that the liability of the surety does not depend upon the failure or otherwise of the accused to make good the amount agreed to be forfeited², nor to the case of an executor giving security to a creditor when personal liability was not intended³. Where a Judgment-debtor was released on furnishing security for a sum of Rs. 500, the surety undertaking to produce the judgment-debtor in court in the event of his not applying to be adjudicated insolvent within a month, the judgment-debtor, in fact, did not apply for adjudication as an insolvent and the surety further failed to produce him, *held*, the sum was to be applied in satisfaction of the decree⁴. A surety for satisfaction of a decree (that may be passed) is liable. He becomes a judgment-debtor under S. 145, C. P. C. and an application for an execution against him is governed by S. 182 of the Limitation Act⁵.

3. **Suit against surety.**—A creditor is not bound to exhaust his remedy against the principal debtor before suing the surety⁶. Therefore, a suit is maintainable against the surety though the principal debtor has not been sued⁷. The liability of a surety being co-extensive with that of the principal debtor must be held to be joint and several with the latter and, therefore, it is at the option of the creditor, in the absence of a clear intention to the contrary, to decide whether he shall proceed against the surety or the principal debtor⁸. It is well settled that a creditor is entitled to proceed against the surety without exhausting his remedies against the principal debtor (see Ss. 128, 137, 140). S. 140 presupposes that the surety is compelled to pay without the creditor resorting to the principal debtor for payment⁹. The creditor, of course, can sue both the surety and the principal debtor. The liability of the guarantor must depend on the construction of the contract of guarantee. A guarantor is *prima facie* entitled to have his debt proved against him¹⁰. The surety may also be proceeded against after a suit has been brought against the principal debtor, and the surety does not lose his remedy against his debtor in such a case. The causes of action are distinct.

²⁰ *Balkrishna v. Atmaram*, 1944 N 277.

¹ *Bank of Bengal v. Sen*, 42 IC 900.

² *Ahdul v. Emperor*, 147 IC 127, see conflicting rulings *refd.* to.

³ *Jamshed v. Sorahji*, 1940 PC 75.

⁴ *Surendra v. Keshab*, 25 CWN 36.

⁵ *Harendra v. Gurupada*, 41 CWN 1099; for construction of a contract regarding the extent of a surety's liability, see *Fatima v. Ahmad*, 41 CWN 965 PC.

⁶ *Lachhman v. Babu*, 6 Bom HCA CJ 241; *Sankana v. Virupakshapa*, 7 B 146; *Puniah N. Bank v. Arora*, 149 IC 1124; *Budh Singh v. Mukund Murari*, AIR 1975 All 201.

⁷ *Totakot v. Kurusingal*, 4 HC 190.

⁸ *Depak v. Secretary of State*, 118 IC 443; *Mohideen v. Dawood*, 51 MLJ 203; *Chokalinga v. Dandayuthapani*, 113 IC 337.

⁹ *Parthasarathy v. Yelchoori*, 37 IC 401; *Swaminatha v. Lakshmana*, 1935 M 748; *Gokul v. Lakhmi*, 1933 N 287.

¹⁰ See *M. Mills v. Ratilal*, 1941 B 108.

No cause of action arises against the surety until the breach of condition of the surety bond is proved against the principal debtor¹¹, or until the happening of a contingency if that be the stipulation¹². An action against the sureties is not barred because proceedings have been taken under the Co-operative Societies Act against the principal debtor in which the sureties could not be parties¹³. A decree obtained against a person who is not the legal representative of the deceased debtor is not binding on the surety and the latter is not liable to pay what would be due from him under the bond in other circumstances¹⁴. A surety is liable on the lessee's death, in the absence of any personal element inducing him to stand as surety¹⁵. The section has not the effect of converting a suit against a surety on a money bond into a suit for payment of money charged upon immovable property¹⁶.

A decree against surety may be enforced in the same manner as a decree for any other debt¹⁷. In an action against a surety the amount of damage cannot be proved by any admission of the principal debtor. Judgment against the debtor would be no evidence against the surety for the amount due but the creditor must prove it over again against the surety¹⁸. Under a fidelity guarantee the loss, to be recoverable in a suit against the guarantor, must be proved to have arisen from misconduct on the part of the employee in connection with the business in which he was engaged and to be within the scope of the agreement¹⁹. A security bond executed by a surety on behalf of an appellant for the costs of an appeal cannot be summarily enforced against the surety in execution proceedings; the remedy is by a separate suit²⁰.

The giving of notice in writing to a surety is a condition precedent to the validity of an order for execution against such surety. This notice may be given by the court which passes the decree or the court to which the decree is sent for execution¹. Where a surety besides giving his personal undertaking mortgages his property for the due performance of the decree, the decree-holder can attach and sell the property in execution in the manner set out in S. 145, C.P.C., O. 34, r. 14 would be no bar². The two must be read together. Therefore, after the judgment-debtor has failed to pay the decretal amount, the decree-holder is entitled to proceed against the surety³.

11 *Kirkpatrick v. Chetram*, 11 ALJ 689.

12 *Phillips v. Mitchell*, 1930 C 17.

13 *Traders Co-operative Bank v. Mallick*, 147 IC 702.

14 *Pukhraj v. Jamsetji*, 28 Bom LR 1382.

15 *K. Estate v. Sheo*, 1942 O 325.

16 *Muthu v. Rangappa*, 105 IC 168.

17 *Lachhman v. Bapu*, 6 Bom HCA CJ 241.

18 *Re Kitchin*, 17 Ch D 668; *Rambhajan v. Sheo Prasad*, 5 ALJ 142; *Kalanand v. Sri Prasad*, 19 CLJ 152.

19 *Sri Kishen v. Secretary of State*, 12 C 143 PC.

20 *Kati v. Balgobind*, 15 C 497; *Tokhan v. Udwant*, 22 C 25; *Sonatun v. Dinonath*, 26 C 222; but see *Sukumari v. Mugneeram*, 54 C 1; per contra *Kusaji v. Vinayak*, 23 B 478; *Jamesedji v. Bawabhai*, 25 B 409.

1 *Lakshmishankar v. Raghmal*, 29 B 29.

2 *Gurushantappa v. Gurava*, 50 B 339.

3 *Gokul v. Laxmi*, 150 IC 683.

There is nothing to debar the other sureties from filing an appeal if one of them refrain from doing so⁴.

4. Limitation.—The liability of the surety arises immediately on execution of the guarantee and limitation runs from that date. Art 115 applies to such a suit⁵. But in another case it has been pointed out that the liability of a surety on a promissory note executed by the principal debtor begins on the date of the note and extends to three years from that date whether Art 63 or 115 applies⁶. The question as to when time begins to run has to be decided on the terms of the contract of guarantee⁷. The provisions of the section must be read together with the Limitation Act and not so as to nullify its provisions limiting the time within which a suit must be brought after the accrual of a cause of action. Payment of interest by the principal debtor cannot create a new period of limitation for the surety's debt, for the principal cannot be regarded as an agent duly authorised by the surety to pay⁸. The section defines the measure of the surety's liability and has no reference to the extinction of the liability by operation of the Statute of Limitations. "The fact that the interest was paid with the knowledge and consent of the surety, and even at his request, makes no difference unless the circumstances could be said to render the payment as one on behalf of the surety"⁹. An acknowledgement by the principal debtor does not save limitation against the surety, unless it is shown that the latter allowed himself to be represented by the person who made the payment¹⁰. The same principle applies to a continuing guarantee¹¹. In an English case it has been laid down that the Statute of Limitation does not run against a surety until demand has been made by the creditor upon the principal debtor for payment¹². Where the surety is liable under a registered contract the limitation is six years¹³. An application to enforce the security bond against a surety should, under the Limitation Act, be made within three years if it is made by an application in the suit, or within six years if made by an independent suit¹⁴.

129. Continuing guarantee.—A guarantee which extends to a series of transactions is called a "continuing guarantee."

Illustrations

(a) A, in consideration that B will employ C in collecting the rents of B's zamindari, promises B to be responsible, to the amount of 5,000 rupees, for due collection and payment by C of those rents. This is a continuing guarantee.

4 *Chattar v. Makhan*, 1936 Pesh. 20.

5 *Raja Sreenath v. Raja Peary*, 21 CWN 479.

6 *Braiendra v. Hindusthan Insurance Society*, 44 C 978.

7 *Daljit v. Harkishan*, 1940 A 116.

8 *Gopal v. Gopal*, 28 B 248.

9 *Braiendra v. Hindusthan Insurance Society*, 44 C 978.

10 *Dialu v. Nandu*, 13 L 240.

11 *Suwalal v. Fazle*, 1939 N 31.

12 *Raja Raghunandan v. Raja Kirtyanand*, 63 MLJ 85 PC.

13 *Bradford Bank v. Sutcliffe*, (1918) 2 KB 833.

14 *Kaloo v. Sunderabai*, 95 IC 707; *Sohan v. Puran*, 35 IC 537 fold.

(b) A guarantees payment to B, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of £100, and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

1. **The section.**—"The distinction between an ordinary and a continuing guarantee is important with reference to the duration of the liability of the surety. Under the former the surety is liable only in respect of the single transaction. Under a continuing guarantee the surety is *prima facie* liable in respect of any of the successive transactions which come within its scope"¹⁵, unless revoked in the manner laid down in the following sections.

2. **Continuing guarantee.**—Whether a guarantee is a continuing one or not "must be construed according to the intention of the parties as expressed by the language they have employed; this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written"¹⁶. The question cannot be decided "upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject matter which the parties had in their contemplation when the guarantee was given." Where the guarantee is intended to be limited to one transaction, one would expect something to limit it to that dealing, but where the language is general and is capable of meaning that the defendant is intended to be answerable for a series of transactions, *e.g.*, goods at any time supplied, it is a continuing guarantee¹⁷. "Each case must, no doubt, depend entirely upon the language used, and the document must be looked at with reference to the special circumstances under which it is given"¹⁸. In determining the construction of a written contract of guarantee, the court is entitled to look at the surrounding circumstances in order to consider (i) who the parties were, (ii) in what position they were, (iii) what the subject-matter of the agreement was¹⁹. All contracts of guarantee are called collateral contracts being dependent on another contract which is the main contract. The test to distinguish a continuing guarantee from a simple guarantee is the nature of the consideration. If it is fragmentary and divisible supporting, for example, a running or floating balance, the guarantee is continuing and revocable. If it is entire, supporting, say, the grant of a lease or the fidelity of an employee, it is non-revocable. Illustration (a) has been said to be wrong, for a guarantee which depends upon a main contract of employment between a master and a servant in the nature of a surety for

¹⁵ C & S 391.

¹⁶ *Coles v. Pack*, LR 5 CP 65, 70.

¹⁷ *Heffield v. Meadows*, LR 4 CP 595.

¹⁸ *Nottingham Hide Co. v. Bottrill*, LR 8 CP 694.

¹⁹ *Morrell v. Cowan*, 7 Ch D 151; *Lloyds v. Harper*, 16 Ch D 290, 303; *Laurie v. Scholefield*, LR 4 CP 622.

the servant's liability is not a continuing guarantee. The surety is entitled to recall a fidelity guarantee once exact information reaches him that the principal debtor has been guilty of misconduct²⁰.

A guarantee intended to secure advances to be made from time to time during a period of 18 months, the sureties intending to make themselves liable for those advances to the extent of £1,000, is a continuing guarantee with a limit as to the guarantor's liability. It does not render the obligation void if the advances go beyond it, unless that clearly appears to be the intention of the parties¹. Where the managing director of the managing agent company managing the affairs of another company in his individual capacity executes a bond guaranteeing to a bank payment on demand of all monies which may at any time be due to the bank from the managed company on the general balance of that account with the bank, the guarantee is a continuing guarantee for the ultimate balance which shall remain due to the bank on such cash credit account². In a case where the facts were similar to *illust. (a)*, the court held the guarantee to be a continuing guarantee³. But a fidelity guarantee has been held in one case by the Privy Council to be not a continuing guarantee. In a guarantee given in connection with the appointment of a person to a place of trust there is no series of transactions but it is all one transaction. So long as he continues in that place the guarantee remains and will not be revoked by the death of the guarantor⁴. Where A was in debt to B on account of coals supplied and a further dealing on credit was contemplated, and a guarantee by A's father, C, was expressed to be given in consideration of that credit, *held*, it not only referred to the existing debt but referred to credit to be supplied. The guarantee, therefore, was a continuing guarantee⁵. Illustration (c) is taken from the case of *Kay v Groves*⁶, where an agreement "to be answerable to K for the amount of five sacks of flour," to be delivered to T in one month was held to be a guarantee for flour, not exceeding five sacks delivered at one time, and not a continuing guarantee for parcels delivered at subsequent periods though not exceeding in the whole five sacks.

A guarantee for payment of 11 instalments by the licensee of a liquor shop on due dates is not a continuing guarantee⁷. A guarantee given for the payment of bills in respect of goods supplied to the principal debtor is a continuing guarantee, the surety is liable up to the limit of his guarantee even though after the guarantee is given goods to a greater amount than the limit are supplied⁸. A request to advance monies to another person up to

20 *Myinguan Municipal Committee v. Po.*, 127 IC 369; *Phillips v. Foxall*, LR 7 QB 666, 681 cited.

1 *Laurie v. Scholefield*, LR 4 CP 622.

2 *Punjab National Bank v. B. C. Mills*, AIR 1970 SC 1973

3 *Durga v. Durga*, 55 C 154, value of illustration stated.

4 *Sen v. Bank of Bengal* 49 IA 164.

5 *Wood v. Priestner*, LR 2 Ex 66, on app. 282, see as to the difficulty of construction of such an instrument.

6 6 Bing 276.

7 *Bhagwandas v. Secretary of State*, 28 Bom LR 662.

8 *Mayer v. Isaac*, 6 M&W 603. *

a certain limit for trading purposes is a continuing guarantee. Such a request may be accepted by acting upon it, i.e., by making the advance, no formal acceptance is necessary⁹. Where a guarantee has been given for the performance of a definite engagement, which has already come into existence, and is not contingent, the consideration for which is not variable as the result of future dealings between the parties, the contract is not one of continuing guarantee. Thus, a guarantee for the due performance of the payment of rent under a lease is not a continuing guarantee¹⁰. Where sureties guarantee the performance of "all such orders and decrees as may be given against the said defendant on appeal", the guarantee extends to the final decree passed on the matter being remanded by the High Court¹¹.

A substantial variation in the terms of a continuing guarantee discharges the guarantor. In *National Bank of Nigeria Ltd v. Awolesi*¹² *D* executed a guarantee of *T*'s account with Bank *P* up to £ 10,500. The bank thereafter permitted *T* to open a second account without the knowledge of *D*. It was held that, on its true construction, the guarantee was of the account as it existed at the date when the guarantee was made and the parties did not contemplate the opening of a second account and that, by permitting the opening of the second account, the bank had permitted a substantial variation of the terms of the contract without the defendant's knowledge and to his detriment. The defendant, therefore, was discharged from his guarantee.

It was further held that even where the guarantee to be construed as covering all three accounts, since they had not been operated as one account, whereby the principal sum guaranteed would have been reduced, but had been operated in such a way as to increase the burden on the defendant, the defendant was discharged from his guarantee¹².

130. Revocation of continuing guarantee.—A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

(a) *A*, in consideration of *B*'s discounting, at *A*'s request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2,000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2,000 rupees, on default of *C*.

(b) *A* guarantees to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

9 *T.N.S. Firm v. Muhammad*, 146 IC 608.

10 *Hasan Ali v. Waliullah*, 52 A 997; *Gopal v. Bhawani*, 10 A 531.

11 *Appaji v. Shivlal*, 3 B 204.

12. (1964) 1 WLR 1311 PC.

1. **The section.**—The section lays down a general rule of revocation applicable to all classes of continuing guarantees, but the illustrations given are illustrations of guarantees in respect of which the consideration is divisible and relates to separate transactions. In such cases the guarantee ripens as to each such transaction into an irrevocable promise or guarantee when the person to whom it is given acts upon it. It is immaterial that the guarantee has been given for a definite period, but in English law a distinction is drawn between guarantees of the above kind and fidelity guarantees, and the rule has been thus stated: A continuing guarantee unlimited as to time, during which the engagements guaranteed are to be entered into, and given in consideration of an act once for all done by the persons to whom the guarantee is given, cannot be determined by the guarantor during his life and is not determined on his death on notice of such death being sent. But it may be that where there is a continuing guarantee for advances from time to time to be made to another person, the guarantee can be revoked by the guarantor during his life and is put an end to by notice of his death¹³. The words “future transactions” probably indicate that the Indian law does not differ from the English. In an Allahabad case relating to a guarantee given in connection with the grant of a lease it was doubted whether it was a continuing guarantee or whether it could be revoked during the pendency of the lease¹⁴. But a fidelity guarantee may be revoked under certain circumstances. Thus, it has been laid down that if any default or breach of duty have been committed by the employee against the employer, under such circumstances that the employer should have dismissed the employee, the surety is entitled to call on the employer to dismiss him, but if the employer continue to keep the employee without disclosing the fact of his dishonesty to the surety, the surety is discharged of liability arising out of subsequent dishonesty¹⁵. But acquiescence by the employer in the irregular mode of accounting by a servant has been held not to discharge the surety¹⁶. Suspicious circumstances which come to the knowledge of a creditor and are not communicated at once to the surety do not free him for his obligation¹⁷.

2. **Revocation of continuing guarantees.**—Illust (a) is similar to the facts in *Offord v. Davis*¹⁸, where it has been held that the promise of the surety by itself created no obligation. “It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendant, or to the detriment of himself”. The promise was a mere authority to discount, it was perfectly competent to the guarantor at any time to withdraw that authority as to future transactions of discount, but each discount was a separate transaction, therefore discounts already made created a liability on the

13 *Lloyds v. Harper*, 16 Ch D 290, 317 sq.; *Mahomed v. Howeson*, 30 CWN 266.

14 *Gopal v. Bhawani*, 10 A 531; see *Jagadindra v. Chandra*, 31 C 242, 246, point not decided.

15 *Sanderson v. Aston*, LR 8 Ex 73.

16 *Mayor of Durham v. Fowler*, 22 QBD 394.

17 *National Provincial Bank v. Glanusk*, (1913) 3 KB 335, 338 : (1911-13) All ER Rep 810.

18 12 CBNS 748.

surety till it was repaid. The giving of a new bond does not exonerate a surety from liability under a former bond of his where the new bond is not in substitution of the old¹⁹. A mere denial of his liability by a surety in a previous suit instituted against him by the creditor cannot operate as notice of revocation of suretyship²⁰.

3. **Revocation in special cases.**—S. 130 is not applicable to the security given by the guardian under the Minor's Act XX of 1864; so a surety cannot be released from his obligation as surety on account of the guardian's mal-administration of the minor's estate, that being the very object of the security¹. But the surety may apply to the court for the revocation of the guardian. It is on this ground that the above case was distinguished in *Raj Narain v. Fulkumari*², where it was held that under this section a surety in an administration proceeding could, so far as relates to the future, discharge himself by giving notice. But the other High Courts have dissented from this view. They have held that this section has no application to the special contract of suretyship which is entered into by a surety to an administration bond. The administration bond of a surety cannot be cancelled³. It is not competent to the surety for a receiver to discharge himself merely by notice to the decree-holder or other person at whose instance the receiver was appointed⁴, nor for a surety for the proper administration of *tarwad* affairs without obtaining the leave of court⁵. It is possible however for a surety to withdraw where the guarantee is a continuing guarantee; but where a surety has given a guarantee to cover a definite case the liability continues until the surety is discharged by the court; the surety cannot simply by a notice to the creditor withdraw the guarantee so as to nullify altogether the effect of the security⁶. There is nothing to prevent the court, if satisfied, when good cause is shown, from cancelling the surety's undertaking⁷. An undertaking by a surety to produce the judgment-debtor in court on each and every occasion that his attendance may be demanded by court is a continuing guarantee; under the section it may be revoked at any time by the surety as to future transactions by notice to the creditor. It is immaterial that the revocation is made a day before the date fixed for the appearance of the judgment-debtor in court. No special stipulation in the contract of guarantee reserving to the guarantor a right of revocation is necessary⁸. If the surety requests the court to be absolved from further liability, the court should not

19 *Lalla Bunseedhur v. Government of Bengal*, 14 MIA 86.

20 *Bhikabhai v. Bhuri*, 27 B 418, 424

1 *Bai Somi v. Chokshi*, 19 B 245.

2 29 C 69.

3 *Subroya v. Ragammal*, 27 M 161, fold in *Kandhya Lal v. Manki*, 31 A 56; *Maung Ba v. Pwa*, 36 IC 1000; *Prohlad v. Paran*, 1938 C 757.

4 *Mahomed v. Howeson Bros.*, 30 CWN 266.

5 *Pothera v. Pothera*, 1940 M 730

6 *Abdul v. Belayat*, 37 IC 919; *National G. & S. Association v. Prayag*, 54 A 293, fold in *Mohammad v. Valliappa*, 70 MLJ 708; *Raj Narain v. Fulkumari*, 29 C 69 is a case of a continuing guarantee.

7 *Re Avinas*, 30 ALJ 140; *National G. & S. Association v. Prayag*, 54 A 293.

8 *Wali Muhammad v. Ganpat*, 52 A 1014.

refuse to grant the prayer⁹. A surety to court for a party for a specified time may be released from his obligation on his finding someone else willing to offer security¹⁰.

131. Revocation of continuing guarantee by surety's death.—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Revocation by surety's death.—Under this section, unless there is a contract to the contrary, the death of a surety operates as a revocation of a continuing guarantee. The contract in each case must, therefore, be looked into, in order to determine whether the contract of surety has been revoked by the death of the surety or not. If from the contract it can be gathered either from the express provisions contained in it or by necessary implication that there was an agreement that the death of the surety would not operate as a revocation, then the contract of guarantee must be held to continue even after the death of the surety¹¹. Thus, A and B engaged themselves as sureties and executed a bond on behalf of C binding themselves personally and their representatives after their death. A died. C embezzled a sum of money which was recovered from B. B sued the heirs of A for contribution, *held*, he was entitled to recover, for the agreement showed that the bond should remain operative after the deaths of the sureties and there was no stipulation, express or implied, that the death of one of the sureties by itself would terminate the responsibility¹². In *Gopal v. Bhawani*¹³, the court did not decide whether it was a case of a continuing guarantee under this section. It came to the conclusion that having regard to the terms of the agreement and the circumstances under which it was executed, the parties intended that the guarantee should continue during the whole of the currency of the lease, therefore the liability of the surety continued notwithstanding his death during the pendency of the lease. A surety is not released from his future liability under a joint and several continuing guarantee by the death of his co-surety¹⁴. A surety under O. 41 r. 6 must be taken to have accepted all risks; he is not discharged on the death of the decree-holder for whom he has stood surety pending appeal. Such a suretyship is not a continuing guarantee under S. 130¹⁵. If however the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself; notice in writing is necessary to

9 *Sirajuddin v. Guranditta*, 151 IC 154.

10 *Srinivasa v. Chenna*, 92 IC 251.

11 *Durga v. Durga*, 55 C 154.

12 *Muhammad v. Muhammad*, 43 A 132.

13 10 A 531.

14 *Beckett Co. v. Addyman*, 9 QBD 783; *Ashby v. Day*, 54 LJ Ch 935; 54 LT 408; 34 WR 312 CA.

15 *Jagadamba v. Nilkanth*, 32 IC 807.

determine the surety's liability¹⁶.

A guarantee is revoked by death when it might have been revoked by the guarantor himself at any moment during his life¹⁷. It is an undoubted law that a continuing guarantee for future advances may be revoked or withdrawn altogether before it is acted on, and as to further or future transactions may be terminated at any time, unless the contrary be expressly stipulated. But in the case of a guarantee given for the fidelity of the employee the liability of the surety will not, unless expressly so stipulated in the bond, be determined by his death¹⁸. A continuing guarantee is not determined on the death of the surety¹⁹. But under the peculiar circumstances of a particular case, although notice of death might not have been given, the estate of the surety was held liable for advances made after his death²⁰. On the death of the judgment-debtor the surety responsible for his production in court is, of course, discharged; it is not open to the decree-holder to proceed against the surety¹. The sons of a surety for the appearance of a judgment-debtor are not liable on the death of the surety, but sons of a surety for the payment of a debt are².

132. Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.—Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

The section.—The section deals with the second of the two kinds of guarantees mentioned in *Duncan Fox & Co. v. N. & S. W. Bank*³. It declares that when two persons contract as principal debtors the creditor is not affected by any private arrangement between them to the effect that one is to be

16 *Coulthart v. Clemenston*, 5 QBD 42 : (1874-80) All ER Rep 865, cited in *Midland Ry. v. Silvester*, (1895) 1 Ch 573.

17 See the summary of the English law in *Durga v. Durga*, 55 C 154.

18 *Re Crace*, (1902) 1 Ch 733.

19 *Bradbury v. Morgan*, 31 LJ Ex 462 : 1 H&C 249 : 7 LT 104 : 10 WR 776.

20 *Harris v. Fawcett*, LR 8 Ch 866.

1 *Nabin v. Mritunjoy*, 41 C 50.

2 *Dhir v. Shiva*, 1935 Pat 127.

3 6 AC 1.

the surety for the other. This arrangement, therefore, cannot be set up as a defence against the claim of the creditor in a suit against the joint promisors even though the creditor has knowledge of the arrangement⁴. An executant of a promissory note is not allowed to prove that he signed merely as a surety even though the lender was aware of the fact⁵. The section however does not affect the rights of the parties *inter se*. Where A conveys certain property to B and C jointly by a sale deed, B is not precluded from showing that he is the real purchaser and C has no interest in the property⁶. Where two persons execute a mortgage, one is not prevented from proving, in a suit against his co-mortgagor for the recovery of the money, that he has been compelled to pay to the mortgagee on the ground that he executed the mortgage bond as a surety only⁷. When two or more persons bound as full debtors arrange either at the time when the debt is contracted, or subsequently, that *inter se* one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interest of the surety, in any question with the co-debtors⁸.

133. Discharge of surety by variance in terms of contract.—Any variance, made without the surety's consent, in the terms of the contract between the principal (debtor)⁹, and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

4 A contrary view however was taken in some old cases, e.g., *Punchanan v. Daly*, 15 BLR 331, *Harjiban v. Bhagwan Das*, 7 BLR 535, which it is respectfully submitted is not good law.

5 *Namburi v. Karnedan*, 156 IC 827.

6 *Mulchand v. Madhroram*, 10 A 421; *Moolji v. Pinto*, 92 IC 667.

7 *Samsh-ul Jahan v. Ahmad*, 25 A 337.

8 *Rouse v. Bradford Banking Corpn.*, 1894 AC 586, 598; *Goldfarb v. Bartlett*, (1920) 1 KB 639.

9 This word was inserted by s. 2 and Sch. I of the Repealing and Amending Act 1917 (XXIV of 1917).

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied inasmuch as C might sue B for the money before the 1st of March.

1. The section.—A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract the performance of which the surety had guaranteed. In pursuance of this principle it has been held that a surety is discharged by giving time to the principal, though the surety may not be injured and may even be benefited thereby¹⁰. The law with respect to principal and surety is well known and settled; it is *strictissimi juris*. The party who is surety for another for the performance of an engagement can only be called upon to guarantee the performance of that engagement when the engagement is carried into complete, literal and strict effect. The parties have no right, without the concurrence of the surety and without his assent, to vary the engagement in any material circumstance; it must be strictly adhered to; it will not do to substitute another engagement, although in substance it may be the same and although it may be more beneficial to the surety. He enters into a particular and specific contract, and that contract alone he is bound to perform. Thus, R together with J as his surety gave a promissory note to bankers who were to give R a draft payable at 3 months. No draft was given but the bankers immediately advanced the amount to R, this was a substantially different transaction and J was released from his liability as surety¹¹. As has been observed by the Privy Council: "The principle is that the surety, like any other contracting party, cannot be held bound to something which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract is gone, and unless the surety has assented to the terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety has guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place." The same principle applies where there has been no express agreement between the creditor and the surety to vary the contract. The fact that the creditor stood by and permitted something to be done which made the original performance impossible discharged the sureties whose consent had not been obtained. Whether the section relates only to continuing guarantees or is intended to affect a guarantee of one obligation, it cannot operate to alter the primary law of the contract

¹⁰ *Ward v. National Bank*, 8 AC 755; *General S. N. Co. v. Rolt*, 6 CBNS 550.

¹¹ *Bonser v. Cox*, 13 LJ Ch 260; (1835-42) All ER Rep 173; *Blest v. Brown*, 4 DGF&J 367: see illust. (e); *Gundla v. Kotta*, 1938 M. 422.

of guarantee that the promisee must show performance before he can hold the promisor bound to his promise¹². The section provides for variations of a contract contemplating a series of transactions extending over a period of time¹³. But where without inquiry it is evident that the alteration is unsubstantial, and one which cannot be prejudicial to the surety, he is not discharged; yet if it is not self-evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the court will not in an action against the surety go into an inquiry into the effect of the alteration¹⁴; so also where a guarantee is given for the due performance of distinct duties, a discharge of the sureties with regard to some of the duties will not discharge them with regard to the others¹⁵; the release of a surety from liability will discharge the security given by the other sureties¹⁶. Before a creditor can enforce the liability given by a guarantor, he must satisfy the court that the conditions of the bond have been strictly observed and that he is seeking to enforce the very liability undertaken by the guarantor¹⁷. There are three ways in which the surety may be discharged, (i) by time being given to the debtor (S. 135); (ii) by an alteration in the contract between the principals (S. 133); and (iii) by the principals dealing together so as to affect the position of the surety to his prejudice (see Ss. 134, 139)¹⁸. The underlying principle of sections 133 to 141 apply to surety bonds executed in favour of courts¹⁹.

2. Discharge by variation in terms.—A surety is ordinarily what is called a favoured creditor. A contract of guarantee is said to be a contract *strictissimi juris*, that is to say, the surety is entitled to insist on a rigid adherence to the terms of his obligation by the creditor. He is liable only for losses arising in the ordinary and natural course of things from a breach of the strict terms of the contract guaranteed²⁰. The principle is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract, presumably the surety is discharged forthwith, for the parties have made it impossible for the guaranteed performance to take place¹. A new arrangement between the creditor and debtor, e.g., a reduction in the amount of the loan and a release of one of the properties to be mortgaged, is a substantial variation of a contract which has the effect of discharging the surety. A variation in the contract between the principal debtor and the creditor will absolve the surety only if the

12 *Pratansing v. Keshavlal*, 59 B 180 191 PC; *H. Pin v. Paungde*, 1938 R 126; *Mohammad v. Valiappa*, 1936 M 576.

13 *Keshavlal v. Pratan*, 137 IC 564.

14 *Holme v. Brunskill*, 3 OBD 495, cited in *Ward v. National Bank*, 8 AC 755, 764, in *Noor Mahomed v. Dhaniram*, 96 IC 234.

15 *Skillett v. Fletcher*, LR 1 CP 217, on ann. 2 CP 469; *Croydon C. Gas Co. v. Dickinson*, 2 CPD 46; *Thakar v. Sham*, 49 IC 438.

16 *Smith v. Wood*, (1979) 1 Ch 14; (1928) All ER Rep 229.

17 *Gundla v. Kotla*, 1938 M 422.

18 *Croydon C. Gas Co. v. Dickinson*, 2 CPD 46, 49.

19 *Pirithi v. Ram*, 1944 L 428.

20 *Mercantile Bank v. Tahirram*, 27 IC 309; *Pratapsing v. Keshav*, 59 B 180 PC; *Motilal v. Akbar*, 1939 B 309.

1 *Harendra v. Gurupada*, 41 CWN 1099, citing *Pratap v. Keshav*, 62 IA 23, 33

variation be such as materially affects the position of the surety². A surety is not discharged by the creditor advancing goods to the principal debtor beyond the amount fixed in the surety bond, but his liability is limited to the stipulated amount³. Where the principal debtor is allowed credit by a bank under a written agreement up to Rs. 1,00,000 but this is subsequently reduced to Rs. 50,000 and again raised to Rs. 1,00,000 through oral instruction to the cashier, the surety who made himself liable in writing up to Rs. 1,00,000 is not discharged as, in fact, there is no variation in the terms of contract between the principal debtor and the creditor⁴. A different performance of the original contract is a variation of the contract, and unless the surety has assented to the new terms, he is discharged on the contract being altered without his consent⁵. Where a surety furnished security for the recovery of any balance due from the judgment-debtor after his share in the house was sold, and the share of the judgment-debtor was reduced by reason of the mother getting a decree for a share in the house in respect of her right of residence, the surety was not discharged, as the bond did not specify the exact share that was going to be sold and the decree in favour of the mother did not create any new right, therefore the terms of the bond were not altered in any way by the decree⁶. Where a surety could not produce a judgment-debtor in court on a certain day, it having been declared a holiday, he could not be called upon to produce him on another day⁷. Though a surety's liability is not to be unduly extended, nevertheless it comprises all transactions which naturally and reasonably are entered into on the faith of the guarantee⁸. The breach of a contract or forbearance to sue is not a variation⁹. Where the creditor accepts the repudiation of the contract by the principal debtor the surety's liability in respect of past and future liabilities are not discharged¹⁰. When there has been alteration of the original contract between the creditor and the principal debtor without the consent of the surety, the surety will be wholly discharged¹¹. Where a surety executes a bond for the appearance of the accused in a certain court, then the case is transferred to another court, and finally retransferred to the original court, the surety is discharged by the transfer of his case and his obligation is not revived by the retransfer¹². A surety for a tax-collector is not liable if the municipality allows the latter's son to collect the taxes without the former's knowledge for defalcations made by the son¹³. Where,

2 *Mathra v. Shambhoo*, 112 IC 843.

3 *Moosa v. Abdul*, 1937 M 360; but see *Suwalal v. Fazle*, 1939 N 31.

4 *Amrit Lal v. State Bank of Travancore*, AIR 1968 SC 1432.

5 *Pratap v. Keshav*, 59 B 180 PC.

6 *Nathu v. Mulkraj*, 166 IC 111.

7 *Johnston v. Dwarka*, 109 IC 546, such a contract is to be strictly construed.

8 *Tulsidas v. Hasim*, 78 IC 868.

9 *Kanai v. Jatindra*, 1 IC 715.

10 *L.E.P. Air Services Ltd. v. Rolloswin*, (1971) 3 All ER 45.

11 *Polak v. Everett*, 1 QBD 669; (1874-80) All ER Rep 991, explained in *Ward v. National Bank*, 8 AC 755; *Jawand v. Tirathi*, 1939 L 193.

12 *Emperor v. Pandhi*, 152 IC 874.

13 *H. Pin v. P. Municipality*, 1938 R 126.

however, the creditor has by his own act rendered unavailable a part of the security, to the benefit of which the surety is entitled¹⁴, or where nothing has been done by the creditor which is contrary to the faith of his contract¹⁵, the surety is discharged not absolutely but *pro tanto*¹⁶. When there is a change from a fixed salary to a commission in the remuneration of an agent the surety is discharged¹⁷, as there is in such a case the substitution of a new agreement in place of the former one¹⁸. But reduction in the salary of the employee has been held in one case not to have the effect of discharging the security as the maintenance of the same pay cannot be considered an essential ingredient in the contract¹⁹. A surety of an employee for the period of one year is discharged on the latter's reappointment²⁰. The reason is that when the surety bond shows that the surety does not mean to be bound for a future reappointment or re-election, the guarantee will be confined to the holding of office during the time mentioned in the bond. But where the bond provides for such an event and an Act of the legislature directs that instead of the employee being annually elected should "hold his office during the pleasure of the Council", the surety will continue to be liable under the original bond as the employee continues to be in office within the true intent and meaning of the bond¹. An alteration in the rate of commission payable to an employee is, in effect, the substitution of a new agreement, which discharges the surety of his liability. A surety is nonetheless discharged because he waives his statutory right to treat the variation as a breach². Where two sureties enter into an agreement with a company guaranteeing the payment of certain instalments then owing upon the shares in the company and the company, on failure of payment of instalments by the shareholders and the sureties, proceeds to forfeit the shares, the sureties are discharged from liability (i) by determination of the original contract between the creditor and the principal debtor and the substitution of a fresh and more onerous liability for the liability which subsisted under the original contract; (ii) by the taking away of the equitable right of lien on the shares which the sureties would have had under their guarantee against the principal debtor, had the sureties paid the amount of the instalments in arrears³. Where a decree-holder allows time to the principal debtors for the purpose of increasing the amount of interest, and thereby lays an additional burden upon the sureties, the decree-holder is not entitled to interest after the time when he ought to have put up the property

14 See *Pearl v. Deacon*, 24 Beav. 186.

15 See *Petty v. Cooke*, LR 6 QB 790.

16 *Taylor v. Bank of N. S. Wales*, 11 AC 596.

17 *N. W. Ry. v. Whirney*, 23 LJ Ex 261.

18 *Bonar v. Macdonald*, 3 HLC 226, see the statement of the rule, see rule (a), person appointed to a different office.

19 *Frank v. Edwards*, 8 Ex 214.

20 *Mayor of Cambridge v. Dennis*, 27 LJQB 474.

1 *Oswald v. Mayor of Bernick*, 5 HLC 856; *Mayor of Clifton v. Silly*, 26 LJQB 90.

2 *Chitguppi v. Vinayak*, 45 B 157.

3 *Re Darwen & Pearce*, (1927) 1 Ch 176, *refng to Stocken's Case*, LR 3 Ch 412; *Ladies Dress Assocn. v. Pullbrook*, (1900) 2 QB 376; *Polak v. Everett*, 1 QBD 669, 673; (1874-80) All ER Rep '991.

for sale⁴. When a settlement contract is made reselling the goods back again from the original buyer the intention is not that after the settlement contract, the first contract should be gone but that the two contracts should stand together⁵. Each contract being capable of performance on the due date there is no rescission of the original contract by a new agreement, so the surety under the resale contract is not discharged from liability⁶. A transfer from one department of an office to another, where the original appointment was a general one covering all the departments, does not discharge the surety⁷, but an employment in a different office does⁸. Where 12 persons deposited the title deeds of their respective properties to secure payment to the defendant of sums due or to become due to him from a company, and one of the depositors prevailed on the defendant to hand over the title deeds that she had deposited with her, this had the effect of discharging the other depositors. The release by the defendant of any one of the securities is an interference with the contractual rights of the other sureties⁹. Where the directors of a company stood as sureties for advances made by a bank to the company on reconstruction of the company, of which no notice was given to the bank apart from a change in the name, the sureties were liable for advances made to the new company.¹⁰ An agreement made by a lessee with the lessor, without the consent of the surety, that the latter will pay rent at a higher rate, amounts to a variation of the terms of the contract of guarantee and discharges the surety from liability in respect of arrears of rent accruing subsequent to such variation.¹¹ A material variation of the terms of the contract with the principal, e.g., prepayment to a contractor without the knowledge and consent of the surety, discharges the surety.¹² Where by a bond the surety defendant has bound himself for the performance by the principal debtor of two matters which are entirely separate and distinct, e.g., if the defendant has become surety for the performance of one of them by one bond and of the other by another bond, in that case any alteration in the position of the principal in relation to the subject matter of the one bond cannot affect the surety's liability as to the subject matter of the other bond.¹³ Where an intended variation of a contract between a creditor and a debtor without the knowledge of the surety is illegal and therefore cannot take effect, it does not invalidate the contract of guarantee and therefore does not discharge the surety from his liability.¹⁴ When the surety guaranteed the payment for any gold which the plaintiff might supply to the goldsmith for the purposes of his trade, gold advanced by the plaintiff, together with money spent in discounting

4 *Ramanund v. Chowdhry*, 4 C 331 PC.

5 *Uttam Chand v. Jewa Mamoon*, 46 C 534, 542.

6 *Uderam v. Shubhajan*, 22 Bom LR 711.

7 *Portsea Union v. Whillier*, 29 LJQB 150.

8 *Malling Union v. Graham*, LR 5 CP 201.

9 *Smith v. Wood*, (1929) 1 Ch 14.

10 *Ashby v. Day*, 54 LJ Ch 935; *Jayannath v. Shiv*, 1940 B 247.

11 *Khatun Bibi v. Abdullah*, 3 A 9.

12 *General S. N. Co. v. Rolt*, 6 CBNS 550.

13 *Harrison v. Seymour*, LR 1 CP 518.

14 *Egbert v. National C. Bank*, 1918 AC 903, 909.

bills for the goldsmith, is not gold supplied within the meaning of the guarantee. Guarantees ought to receive a strict construction¹⁵. Where plaintiffs advance a certain sum of money to a company on the guarantee of two of the directors and it is stipulated that the plaintiffs should repay themselves the amount "from the first moneys received by them on account of the said company", but the plaintiffs appropriate the sums due to themselves from the company and they receive sufficient to pay the guaranteed loan, the guarantee is discharged.¹⁶ The dismissal of a suit for default and its subsequent restoration has no effect on a surety bond. The surety is not discharged from his bond by a consent decree being passed against the judgment-debtor, for a consent decree, if not in anywise fraudulent, is just as much within the terms of such a bond as any other decree.¹⁷ Where a suit for the recovery of money is compromised, among other terms, by an attachment of the property of the defendant and a person stands surety for the performance of the terms by the defendant, an order for sale is not a variation of the contract between the principal and the creditor which has the effect of discharging the surety. The order for sale not having been carried out amounts at the most to an agreement to vary the contract and not to an actual variation of its terms¹⁸. Where a decree was made against the judgment-debtor and two sureties, and the judgment-debtor alone appealed, with the result that plaintiff's suit was dismissed against all three, on revision the High Court held that the sureties were not discharged from the judgment debt, though they were made liable only in the event of the principal debtor not paying the decretal amount.¹⁹ A surety who undertakes to produce the judgment-debtor when called upon by the court to do so is bound so long as the judgment-debtor is bound. He cannot plead satisfaction of the decree by any adjustment or discharge of the decree which has not been certified by the court²⁰. A surety for a party in a suit is discharged from his obligation where the compromise which is subsequently embodied in the decree is not one which was in the contemplation of the parties¹. Where a surety guarantees payment for conveyance of property free from encumbrances apart from those mentioned in a schedule, and it turns out that the property is charged with another encumbrance, which the vendor forgot and of which the guarantor had no knowledge, the surety is discharged from liability². Where pending an appeal to the High Court a judgment-debtor obtains a stay of execution of the decree on furnishing a surety for the interest on the decretal amount and a surety bond is executed on those terms, but the High Court grants a stay of execution of the decree on the defendant furnishing security on quite different terms, the order of the High Court puts an end to the obligation of the surety who is discharged from the date of the order

15 *Evans v. Whyte*, 5 Bing 485.

16 *Nicholls v. Wilson*, 4 C 560.

17 *Jia Bai v. Jaharmall*, 59 C 1450, fold in *Veeraswami v. Ramanna*, 68 MLJ 444.

18 *Darshan v. Khair*, 73 IC 353; *Mahanth v. U Ba*, 1939 PC 110.

19 *Sham v. Sohnu*, 9 IC 742.

20 *Virareddy v. Devi*, 50 MLJ 584; *Onkarmal v. Nritya*, 67 IC 885.

1 *Mahomedalli v. Lakshmibai*, 31 Bom LR 1442.

2 *Willis v. Willis*, 17 Sim 218.

of the High Court³. Where security is given for the satisfaction of a decree, the decree is set aside but restored on appeal, the surety's liability remains⁴. A surety under O. 38 r. 5 is bound for the amount passed in judgment upon award, an arbitration being an ordinary incident in a suit⁵. It has been pointed out, however, that having regard to the definition given in S. 126, Ss. 133, 135 and 139 cannot apply to a contract of guarantee, where the bond is given to the court, for, as has been said in *Madanlal v. Radhakisan*⁶ "by no stretch of imagination could the court be called a 'creditor' in whose favour the surety executes a bond"; but it does not follow that the principles underlying these sections should not be applied *mutatis mutandis*⁷. The court can correct the security bond where the error is of its own officer, and hold the surety liable⁸. Where an offer was made by a judgment-debtor to a judgment-creditor and was kept open for acceptance for a week but it was not signified till 6 months had elapsed, there being no new contract, the surety was not discharged⁹. The liability of a surety for an employee in the Small Cause Court is not affected by the judge of the court being invested with the powers of a subordinate judge¹⁰.

A agreed to stand surety for an overdraft allowed by Bank to the principal debtor, S. The Bank required a guarantee in the form which was handed over to S. S got it filled by A for a sum of Rs. 25,000. The Bank declined to accept this letter of guarantee. S then took back the letter and after some time brought it back with the figures so changed as to read Rs. 20,000. The Bank accepted this letter and kept it. The Bank sued A upon this letter of guarantee. A raised the contention that as there was a material alteration of the instrument of guarantee, he was absolved of all liability on it.

It was held by Kapur and Hidayatullah JJ forming a majority that the avoidance of contract by material alteration was inapplicable as the document was not altered while in possession of the Bank or its agent but was altered by S who was at the time acting as the agent of A. Sarkar J however took a contrary view¹¹.

134. Discharge of surety by release or discharge of principal debtor.—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

3 *Hiralal v. Manilal*, 28 Bom LR 517.

4 *Manackjee v. Chettyar*, 105 IC 602.

5 *Umermal v. Bhojraj*, 45 IC 429.

6 160 IC 236.

7 *Parvatibai v. Vinayak*, 179 IC 258.

8 *Sri Madho v. Hari*, 1938 N 259.

9 *Brindaban v. Kanhaiya Lal*, 1 ALJ 38.

10 *Grothwaite v. Hamilton*, 1 A 87.

11 *Anirudhan v. Thomeo's Bank*, AIR 1963 SC 746.

Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

1. The section.—“It is an elementary law that in a simple case of principal and surety the surety is discharged if the creditor gives time to the principal or does certain other acts: and *a fortiori*, if the creditor releases the principal debtor, of course, the surety is released too. There are certain number of acts which will not release the surety if, when the act in question is done, there is a reservation of rights against the surety. A common instance of this is the giving of time. When you find in the instrument of suretyship itself a provision that the surety shall be liable notwithstanding certain acts being done by the creditor which would otherwise release him, these doctrines have no application”¹². Any substantial change in the office of the principal, without the surety's consent, discharges the surety from liability¹³. Where a guaranteed creditor along with other creditors entered into a composition with the debtor under which the debtor assigned his estate for the benefit of the creditors, and the creditors discharged the debtor from further liability, the surety was released¹⁴. Where a seller fails to execute a conveyance in favour of the buyer under the terms of the contract, the seller cannot call upon the buyer's guarantor to pay any sum under the guarantee¹⁵. If there be an absolute and unconditional release of the principal debtor by the creditor, the remedy of the surety is gone because the debt is extinguished. The surety cannot be sued in such a case as that would be fraud upon the rest of the creditors. Where, however, the creditor gives time or grants a release to the principal debtor, and there is a reservation of rights against the surety, the surety is not discharged¹⁶. The rule laid down in the above case may be taken to have been embodied in this section. Under the Contract Act, therefore, where there is a reservation of rights against the surety, he is not discharged. So long as there is the possibility of the surety having recourse to the principal debtor for payment or for contribution, the debt itself is not extinguished and the right to proceed against the surety is not affected. Where a suit is brought against

12 *Perry v. National Provincial Bank*, (1910) 1 Ch 464.

13 *Skillett v. Fletcher*, LR 2 CP 469; *Woodcock v. O. & W. Ry.*, 1 Drew 521.

14 *Cragoe v. Jones*, LR 8 Ex 81, see *illust. (a)*.

15 *Probodh v. Gillanders*, 59 CLJ 503.

16 *Batson v. Gosting*, LR 7 CP 9; *Cowper v. Smith*, 4 M & W 519.

three persons and withdrawn against one, the principal debtor, there cannot be a more express reservation of the plaintiff's intention to prosecute his remedies against the other two who are the sureties¹⁷. The section does not apply to a case where the creditor has obtained a decree against both the principal debtor and the surety but the liability of the principal debtor was subsequently extinguished¹⁸. "The extinction of the principal obligation may be the result of a contract between the creditor and the debtor, or may be brought about under S. 39, S. 53, or S. 54, or by some transaction under S. 62 or S. 63. Anything which extinguishes the guaranteed obligation also determines the surety's liability"¹⁹. An express release of the principal debtor coupled with a reservation of the creditor's right to proceed against the surety does not discharge the principal debtor. The remedy of the surety against the principal debtor is not discharged in such a case. The surety is liable for the debt, but when he pays off the debt he stands in the shoes of the creditor and is entitled to enforce remedies available to the creditor²⁰. The section presupposes the existence of a contract of guarantee to which the creditor and the surety, if not also the debtor, are parties. The liability of the surety arises from an undertaking given by him to the creditor in consideration of something done by the latter. If there be no contract between the creditor and the surety, *e.g.*, where security is given pursuant to an order of court, the creditor is not a party to the contract of guarantee under which the sureties become liable. This section, therefore, has no application to such a case¹. After a decree is passed against the principal and surety, the surety cannot plead acts of the creditor which would discharge him from liability². It is not permissible for a creditor to call upon his guarantor to pay any sum under his guarantee in the face of the fact that the creditor has failed to carry out the most important term of the contract guaranteed³. The surety is regarded as a favoured creditor. He is entitled, as such, to insist upon a rigid adherence to the terms of his (the surety's) obligation by the creditor, and cannot be made liable for more than he has undertaken; for though his contract is not like that of an insurer, *uberrima fidei*, it is one *strictissimi juris*⁴.

The rule that the discharge of the principal debtor necessarily carries with it the release of the surety is founded on the principle that it would be a fraud on the principal debtor for the creditor to release him from liability, if the latter were then able to proceed against the surety, who in his turn might sue the principal debtor and thus render the alleged release nugatory. But the case is different if the agreement to discharge the principal debtor contains a

17 *Muruganna v. Munusami*, 38 MLJ 131 see *Webb v. Hewitt*, 3 K&J 438, 442 : 69 ER 1181.

18 *Nellore C. U. Bank v. Akili*, 1948 M 252.

19 C. & S. 401; *Firm Ayili v. Parasetti*, 1937 M 501.

20 *Babu v. Manaklal*, 176 C 686.

1 *Jang Bahadur v. Basdeo*, 34 ALJ 860

2 *Meenakshi v. Velambal*, 1944 MM 423

3 *Probodh v. Gillanders*, 152 IC 571.

4 *Motilal v. Akbar*, 183 IC 785.

reservation of rights against the surety, the release of the principal debtor is not absolute in such a case⁵. Where a partnership is entered into for a limited period of 5 years, on its continuance after the expiration of that period the surety is discharged⁶.

2. **Discharge of surety by release of principal debtor.**—Where the creditor has not done any act the legal consequence of which will be the discharge of the principal debtor, the surety is not discharged. Merely withdrawing a suit against the principal debtor does not amount to a discharge of the principal debtor unless the creditor by act or words definitely exonerates him⁷. Where there is novation of a debt there is an absolute release of the principal debtor, the remedy against the surety is extinguished and no right can be reserved in such a case⁸. A surety has been held not to be discharged by the amalgamation of a bank (by novation of debt)⁹.

Where a creditor proceeds to realise from one of the sureties only and not from the other or from the principal debtor, the creditor having done nothing by his own act or omission to destroy the debt, or to impair the surety's eventual remedy, the liability of the surety subsists¹⁰. The mere omission of the creditor to pursue his suit against the principal debtor by failing or refusing to effect service of summons on him does not discharge the surety from liability, for under O. 9, r. 5 of the Civil Procedure Code the plaintiff has the liberty to bring a fresh suit against him¹¹. The surety, therefore, is not discharged where the creditor merely waives his right of action against the principal debtor, or where the agreement to discharge the principal debtor contains a reservation of the creditor's right against the surety¹². Where a surety undertakes to pay any amount that may be ordered against two defendants in a suit, the dismissal of the suit against one under a compromise decree operates as a release of the surety¹³. Where a surety mortgages his property to secure a debt due to a bank, and it is stipulated that the bank may compound with the principal debtor or give time to him for payment of the debt without affecting the bank's right against the surety, and the bank releases the debtor on payment of a part of the debt by the debtor, it has been held that the bank's right against the surety for the balance is not affected by the release on account of the stipulation in the mortgage deed¹⁴. The release of the principal debtor

5 *Annadana v. Konammal*, 56 M 625, fold in *Kanhar v. Sukananan*, 14 R 594; *Wallibhoy v. Jogivan*, 1936 N 260.

6 *Small v. Currie*, 5 DGM&G 141.

7 *Khushal v. Gauri*, 161 IC 462, refing to *Jawala v. Raj Kumar*, 127 IC 714; *Gurdit v. Gujjar*, 50 IC 312; *Mahant v. U Ba*, 1939 AC 601.

8 *Commercial Bank v. Jones*, 1893 AC 313, distgd. in *Perry v. National P. Bank*, (1910) 1 Ch 464, 478.

9 *Bradford Bank v. Sutcliffe*, (1918) 2 KB 833 : 88 LJ PC 85 : 119 LT 727 : 34 TLR 619 : 24 Com Cas 27 CA.

10 *Bhagwandas v. Secretary of State*, 28 Bom LR 662.

11 *Nathabhai v. Ranchhodlal*, 39 B 52; *Shaik Ali v. Mahomed*, 14 B 267.

12 *Kanhar v. Sukananan*, 14 R 594, see cases refd. to.

13 *Gundla v. Kotta*, 179 IC 594.

14 *Perry v. National P. Bank*, (1910) 1 Ch 464, 478.

with a reservation of remedies against the surety consented to by the surety is to prevent the discharge of the surety upon this principle ; first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction ; and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason ; for the debtor cannot complain if the instant afterwards the surety enforces those rights against him ; his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him¹⁵.

A discharge of the principal debtor by operation of law as in the case of bankruptcy does not release the surety¹⁶. The broad principle of law is that a surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by a fraudulent act or omission against which the surety has guaranteed the employer. Thus, a surety is liable even though the principal debtor obtains payment from his employer by means of a forged certificate¹⁷. The legal consequence of the omission on the part of a creditor to bring the legal representatives of the debtor on the record is to discharge the sureties¹⁸. When one of two sureties without his co-surety's knowledge or consent undertakes with a third party to discharge the original debt, the other surety is absolved from liability¹⁹. The inability of the creditor to proceed with his suit against the principal debtor by reason of the disappearance of the latter and his consequent demand of relief against the surety only does not operate as a discharge of such surety²⁰. Where the creditor takes over the estate of the principal debtor, so as to discharge him, the merger has the effect of extinguishing the surety's liability¹. "Mere omission on the part of the employer, mere passive acquiescence in acts which are improper on the part of the employee, will not release the surety. If there be an omission to do some act which the employer has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled, the case is different. There the omission would be one inconsistent with the relation between the surety and the person with whom he contracted to be surety². Where in a suit against the principal debtor and surety, because summons could not be served upon the principal debtor, the creditor waived his claim against the debtor, the legal effect was to discharge the principal debtor but not the surety³. Where

15 *Kearsley v. Cole*, 16 LJ Ex 115.

16 *Re Jacobs*, LR 10 Ch 211 ; *Re London Chartered Bank*, (1893) 3 Ch 540 ; *Bombay Co. v. Official Assignee*, 44 M 381 ; *Thakur v. Phagwa*, 1936 Pesh 150 ; *Subramanian v. Chinna*, 1942 M 145.

17 *Mayor of Kingston upon Hull v. Harding*, (1892) 2 QB 494.

18 *Nurdin v. Allah*, 106 IC 481.

19 *Kondapalli v. Kondapalli*, 70 IC 355.

20 *Shaik Ali v. Mahomed*, 14 B 267, fold in *Balan v. Hastimal*, 17 IC 893.

1 *Sani v. Ramaswami*, 44 MLJ 171.

2 *Mayor of Kingston upon Hull v. Harding*. (1892) 2 QB 494, cited in *Subramania v. Shaw Wallace*, 58 IC 648.

3 *Moung Po v. Kyaw*, 44 IC 693 ; *Nathabhi v. Ranchodlal*, 39 B 52 cited in above.

an *ex parte* decree passed against the principal debtor was allowed to be withdrawn with leave of court, the suit against the surety was liable to be dismissed⁴, but this view has been held to be wrong⁵. Where the plaintiff has not made any variation in the terms of the contract between him and the principal debtor, nor has released the debtor, nor has by any act or omission discharged him from the performance of the contract, nor has done any act inconsistent with the rights of the sureties, nor has omitted to do any act which his duty to the sureties required him to do, the surety is not discharged⁶.

3. Omission of the creditor to sue debtor within limitation.—The omission of the creditor to bring a suit against the principal debtor within the period allowed by the law of limitation undoubtedly discharges the debtor from his obligation, but the question is whether the surety is thereby discharged. There are conflicting decisions on this point. The High Courts of Bombay⁷, Calcutta⁸, Lahore⁹, Madras¹⁰, Rangoon¹¹, and the Judicial Commissioner's Court at Nagpur¹², have held that when a creditor allows his remedy against the principal debtor to become barred by limitation, the surety is not thereby discharged from his liability to the creditor. A contrary view has however been taken by the High Court of Allahabad¹³. The view of the Allahabad High Court has been disapproved by the Privy Council¹⁴. In an old English case the rule has been thus laid down : "The surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is the passive conduct of the creditor is not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue, or to give him the surety, the means of suing"¹⁵. The mere filing beyond time of an application for restoration of a suit against the principal debtor which was dismissed for default is not such an act or omission as will discharge the surety from his liability to the creditor¹⁶.

The contract has no application to a case governed by the Negotiable Instruments Act. Thus, where the acceptor of a bill is not liable (because

4 *Munshi Ram v. Malava*, 40 IC 400, *Maung Po v. Ko*, 11 LBR 150 fold.

5 *Kanahai v. Sukananan*, 14 R 594.

6 *Kali v. Abdul*, 23 CWN 545 PC.

7 *Hajarimal v. Krishnarav*, 5 B 647, fold in *Sankana v. Virupakshapa*, 7 B 147; *Narayana v. Timmaya*, 31 B 50.

8 *Krishto v. Radha*, 12 C 330; *Bireswar v. Saidpur C Bank*, 41 CWN 1361.

9 *Dil Muhammad v. Sain Das*, 100 IC 922; *Nur Din v. Allah Ditta*, 138 IC 305; *Bharat N Bank v. Thakar*, 16 L 757.

10 *Subramania v. Gopala*, 32 M 308; *Carter v. White*, 25 Ch D 666, 672 : (1881-85) All ER Rep 921.

11 *U Ba. v. Lay*, 10 R 398; *Mahant v. U Ba*, 1939 Rang 358 PC.

12 *Narain Das Nenu*, 116 IC 421.

13 *Ranjit v. Naubat*, 24 A 504; *Jagmohan v. Gatali*, 28 ALJ 1084; *Barakatunnissa v. Mahbub*, 42 A 70; *Anand v. Collector of Bijnor*, 54 A 1007; *Radha v. Kinlock*, 11 A 310; *Saligram v. Lachhman Das*, 50 A 212; *Jang Bahadur v. Basdeo*, 34 ALJ 860; *Chattar v. Makhan*, 1936 Pesh 20.

14 *Mahanth v. U Ba*, 1939 PC 110.

15 *Eyre v. Everett*, 2 Russ 381, 384.

16 *Bharat N Bank v. Thakar*, 16 Lah. 757. See S. 137.

he is joined as a party to the suit after the period of limitation has expired), the drawer is not discharged from his liability if the suit has been instituted against him in time¹⁷. An executant of a promissory note whose undertaking to pay must be unconditional cannot be held in law to have the position of a surety whose liability is conditional on the failure of the debtor to pay¹⁸.

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.—A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

1. **The section.**—The reason why the surety ought to be consulted is that he must be allowed to judge whether the debtor will be given that indulgence contrary to the nature of his engagement¹⁹. The court in giving relief to a surety is not confined to the contract of guarantee²⁰.

2. **Discharge of surety by giving time to debtor, etc.**—A surety is not discharged where by the giving of time the remedy of the surety is accelerated, e.g., where in a pending suit a creditor enters into an arrangement with the debtor with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course¹, nor where the extension of time for payment is made with the surety's consent², nor where the court grants time to the judgment-debtor to pay³, nor where the right against the surety is reserved⁴, nor where the surety's obligation is not merely to produce the debtor and to pay, if the debtor fails to do so, but to pay the debt at once, if the petition to set aside the *ex parte* decree should be unsuccessful⁵. The fact that the plaintiff forbears to sue the moment the debt becomes due at the request of the debtors does not amount to a promise to give time to the debtors. There must be a proposal within the meaning of the definition of the word 'promise' i.e., the debtor must signify his willingness to do or abstain from doing something. A mere request not to sue immediately is not enough⁶. The section contemplates a subsequent contract between the creditor and the principal debtor whereby the time

17 *Jambu v. Sundararaja*, 26 M 239; *Kwong v C. A. Firm*, 1933 R 131.

18 *Lal Behari v. Allahabad Bank*, 27 ALJ 1137; *Shyam v. Mukat*, 1945 A 233.

19 *Rees v. Barrington*, 2 Ves 540

20 *Rajagopala v. Rama*, 1942 M 628

1 *Hulme v. Coles*, 2 Sim 12.

2 *Sukumari v. Mugneeram*, 54 C 1.

3 *Balkrishna v. Atmaram*, 1944 N 277.

4 *Bank of Hindustan v Govinda*, 57 M 482; see S. 134 n. 1.

5 *Yusuf v. Abdul*, (1938) 2 MLJ 768.

6 *Makhan v. Lachmi*, 161 IC 244.

originally fixed is subsequently extended. In the absence of such a subsequent contract the section has no application⁷. What really constitutes giving of time is the extension of the period within which, by the contract between them, the principal debtor was originally obliged to pay the creditor by substituting a new and valid contract between the creditor and the principal debtor to the surety does not assent. Where a Bank gives time to the principal debtor to make up the shortage of goods pledged to the value of several thousand, this does not amount, without more, to promising to give time so as to discharge the surety⁸.

Where a creditor without the knowledge of the surety accepts from the principal debtor a sum of money on account of interest, in excess of the interest then due on a promissory note and so gives time to the debtor, he thereby discharges the surety from his liability on the promissory note⁹. The reason is that the surety has a right, at any time after the debt becomes due, to insist upon proceedings being taken by the creditor at once against the debtor, or he may himself pay off the debt and proceed against the debtor; and binding arrangement between the creditor and the debtor which prevents the surety from doing either the one or the other of these things deprives him of that right¹⁰. The rights of a surety are not to be interfered with without his consent¹¹. Where a creditor impliedly gives time to the principal debtor, the surety is discharged¹². The question whether an agreement to give time to the debtor discharges the sureties or not depends on whether the contract is indivisible or severable. Thus, where there are two debts, the giving of time for the payment of one does not release the surety from his liability as to the other¹³. But an agreement to give time for the payment of arrears of the instalments due under a hire-purchase agreement has been held to discharge the surety not only from any liability in respect of those instalments but also in respect of the whole contract¹⁴. A contract by a creditor to give time to the principal debtor discharges the surety, so also an arrangement providing for postponed payment or for the amount being paid by instalments¹⁵. Where for an existing debt secured by deed a new covenant is taken, by which payment of the debt is postponed by the grant of time to the principal debtor, the sureties to the first debt are discharged from liability¹⁶. The mere taking of additional security does not

7 *Lal Behari v. Allahabad Bank*, 27 ALJ 1137.

8 *Amrit Lal v. State Bank of Travancore*, AIR 1968 SC 1432.

9 *Kally Prosunna v. Umbica*, 18 WR 417.

10 *Protab v. Gour*, 4 C 132; *Annadana v. Konammal*, 56 M 625.

11 *Jagjivandas v. King Hamilton & Co.*, 55 B 677, see as to the meanings of the term surety as used in S. 126 and in S. 135.

12 *Bolton v. Buckenham*, (1891) 1 QB 278; see *Combe v. Woolf*, 8 Bing 156; *Thummala v. Satra*, 1937 M 584.

13 *Croydon Gas Co. v. Dickinson*, 2 CPD 446.

14 *Midland Motor Showroom v. Newman*, (1929) 2 QB 256, 264; *Mohammad v. Valliappa*, 70 MLJ 708.

15 *Annadana v. Konammal*, 56 M 625; *Pirathi v. Ram*, 1944 L 428; *Mohammad v. Valliappa*, 1936 M 576.

16 *Bolton v. Buckenham*, (1891) 1 QB 278.

discharge the surety. Along with it there must be an express or implied contract to give time. It is well established that by giving time is meant not merely forbearance to sue but entering into a binding engagement by which the creditor precludes himself from suing within a certain time¹⁷. But a surety is not discharged from liability by a debtor striking a balance in the account book of the creditor¹⁸. When a surety bond is executed under S. 55 (4), C. P. C. the surety is not discharged by the decree-holder granting time to the judgment-debtor¹⁹. The surety is not discharged by the court granting time to the judgment-debtor²⁰. Where in respect of a debt carrying no interest time is given to the principal debtor for its payment and interest is stipulated to be paid on the debt, the surety is discharged¹.

It is laid down in *Damodardas v. Muhammad*² that a mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety, but the agreement must amount to a contract. Similarly, in an English case, it has been laid down that in order that the surety may be discharged two things are necessary. There must be a binding contract to give time capable of being enforced, also the contract must be with the principal debtor and not with a third party³. But after the ruling in *Chunna Mal v. Moolchand*⁴, it has been doubted if the above is good law⁵. Where a consent decree providing for payment by instalments is made without the knowledge and consent of the surety, he is discharged. Mere forbearance to recover may not release the surety, but giving the debtor the right to refuse to pay, except parts of the debt at stated intervals, alters the position of the debtor as regards the creditor⁶. A surety for a judgment debtor is discharged when the debtor himself surrenders and pays a part of the decretal amount⁷.

A compromise of a suit has the effect of discharging a surety⁸. Where a security bond provides that in case a suit is decreed against the defendant and the decretal amount is not realised, the surety would be liable for it, the surety is discharged by a compromise of the suit whereby the defendant is given one month's time to pay⁹. Where the endorsee of an accommodation note enters into a composition deed with the payee reserving his right against the maker, the maker is not discharged¹⁰. Whether a compromise is or is

17 *T. N. S. Firm v. Muhammad*, 146 IC 608.

18 *Devi Das v. Sant Singh*, 133 IC 652.

19 *Dhari Mal v. Kanshi Ram*, 100 IC 763.

20 *Karipa v. Samba*, 180 IC 60; *Mohammed v. Khadija*, 1938 L 472.

1 *Maung Po v. Begbie*, 30 IC 637.

2 22 A 351; *Lal Behari v. Allahabad Bank*, 27 ALJ 1137; *Maharaj Bahadur v. Basanta*, 17 CWN 695.

3 *Clarke v. Birley*, 41 Ch D 422, 434.

4 55 MLJ 1 PC.

5 *Tejmal v. Secretary of State*, 147 IC 478.

6 *Mahomedalli v. Lakshmi Bai*, 31 Bom LR 1442; *National Coal Co. v. Kshitish*, 30 CWN 540, *Tatum v. Evans*, 54 LT 336 fold; but see *Appunni v. Isack*, 43 M 272.

7 *Bhagwandas v. Nabin*, 1933 C 337.

8 *Narsingh v. Nirpat*, 140 IC 564.

9 *Abdul v. Mannalal*, 98 IC 988; *Kunjilal v. Batuk*, 120 IC 552, but see *Haji Ahmed v. Maruti*, 55 B 97.

10 *Bank of Hindustan v. Govinda*, 1934 M 75.

not excluded by a surety bond is always a question of fact¹¹. It is to be noted¹² that there is a divergence of judicial opinion as to whether the surety is liable after a consent decree. The Patna view is that he is not¹³, that was also the earlier view of the Calcutta High Court¹⁴. The decisions are based on the view that a compromise of this sort deprives the surety of the possibility of being discharged from all liability by the decision of the court, therefore, he is discharged if there is a compromise between the parties behind his back. The Bombay and Madras High Courts take the opposite view¹⁵. The latest decision of the Calcutta High Court agrees with them¹⁶. The Rangoon High Court has held that the mere entering into a compromise decree by the parties could not necessarily discharge the surety, unless new terms are imported which are outside the reasonable requirements of the settlement by consent¹⁷. A consent decree is not any the less a decree because it is agreed to by the parties to the suit and a surety must be taken to have contemplated such a possibility¹⁸. A surety who had executed a surety bond for the satisfaction of the decree that might be passed by the court is not *ipso facto* discharged upon passing of a consent decree, if such consent decree is not the result of any fraud or collusion between the plaintiff and the defendant and if no prejudice is caused to the surety Sec. 133 or 135 will not apply to such a case¹⁹.

136. Surety not discharged when agreement made with third person to give time to principal debtor.—Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by *A* as surety for *B*, and accepted by *B*, contracts with *M* to give time to *B*. *A* is not discharged.

The section.—This section differs from the preceding one by the fact that the contract to give time is not made with the principal debtor but with a third person, hence the surety is not discharged. Such an act also does not obviously come under the rule set out in S. 139. In *Fraser v. Jordan*²⁰, it was held that inasmuch as the agreement to give time was not with the principal debtor but with a stranger, who was no party to the bill, it did

11 *Dalip v. Kishan*, 1937 L 34.

12 *Kabiruddin v. Debi*, 154 IC 461.

13 *Narsingh v. Nirpat*, 11 Pat 590.

14 *National Coal Co. v. Kshitish*, 30 CWN 540; *Muhammad v. Ram*, 55 C 91.

15 *Ahmad v. Maruti*, 55 B 97; *Appuni v. Isack*, 43 M 272.

16 *Jia Bai v. Jaharmull*, 59 C 145.

17 *Mayandi v. Raman*, 174 IC 915.

18 *Annadana v. Konammal*, 56 M 625.

19 *A.A.K. Murtasa v. Jivram Otmal*, AIR 1972 Bom 88, 91.

20 8 E & B 303.

not discharge the surety. As has been stated in *Clarke v. Birley*¹, in order to discharge the surety two things are necessary. There must be a binding contract to give time capable of being enforced; and the contract must be with the principal debtor, if merely made with a third party it will not do.

137. Creditor's forbearance to sue does not discharge surety.—Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to *C* a debt guaranteed by *A*. The debt becomes payable. *C* does not sue *B* for a year after the debt has become payable. *A* is not discharged from his suretyship.

Forbearance to sue.—Simply neglecting to sue the principal debtor, in the absence of any provision in the guarantee to the contrary, will not have any effect upon the surety². Mere laches of the obligee, or mere passive acquiescence by the obligee (e.g., in acts which are contrary to the conditions of a bond), are not sufficient of itself to relieve the surety. There must be some positive act done by the obligee to the prejudice of the surety, or such degree of negligence as to imply connivance and amount to fraud. In applying the section a careful distinction must be made between a variation of a contract and a mere forbearance³. Actual waiver is something more than mere forbearance, for the legal consequence of a waiver is the discharge of the principal debtor⁴. Mere forbearance means a forbearance not resting upon or in consequence of such a promise to give time to, or not to sue the principal debtor, as will amount to a contract⁵; this forbearance must be forbearance from suing the debtor within the period of limitation⁶. A statement by the creditor that he does not intend to file his claim against the principal debtor does not amount to a waiver of his claim against him so as to discharge the surety from liability⁷.

A surety cannot compel the creditor to enforce his rights against the principal debtor. The creditor may abstain from using any right that he possesses. Notice of default by the principal debtor need not be given to the surety. A creditor cannot be charged with having granted time to the principal debtor for failing to sue the latter within the time fixed by the rules of the creditor's society, for the rules form no part of the contract between

¹ 41 Ch D 422.

² *Oriental Financial Corpn. v. Gurney & Co.*, LR 7 Ch 142, 150; *Kali v. Abdul*, 23 CWN 545 PC; *Tulsidas v. Hashim*, 78 IC 868.

³ *Ah Yan v. Wakema M. Committee*, (1937) 1 Rang 405.

⁴ *Mercantile Bank v. Tahiram*, 27 IC 309.

⁵ *Williams v. King*, 20 IC 189.

⁶ *Hazarimal v. Krishnarav*, 5 B 647, 651.

⁷ *Chatter v. Makhan*, 1936 Pesh 20.

⁸ *Ma Kwi v. On*, 119 IC 749.

the creditor and the surety⁹. Where the principal debtor to a certain extent broke his part of the contract and the creditor did not immediately enforce his remedies under it, this did not amount to a variation of the contract or have the effect of discharging the surety¹⁰.

138. Release of one co-surety does not discharge others.—Where there are co-sureties, a release by the creditor of one of them does not discharge the others ; neither does it free the surety so released from his responsibility to the other sureties.

The section.—The general principle applied to the particular case of co-sureties in this section has been laid down in S. 44. The English law is different. It is to the effect that when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each. But where the sureties have contracted severally the creditor does not break that contract by releasing a several surety¹¹.

The liability of sureties is under the law joint and several. If a creditor seeks to enforce the surety bond against some only of the joint sureties, the other sureties will not on that account be discharged ; nor will release by the creditor of one of them discharge the others (vide Ss. 137 and 138 of the Contract Act). But the fact that the surety bond is enforceable against each surety severally, and that it is open to the creditor to release one or more of the joint sureties, does not alter the true character of an adjudication of the court when proceedings are commenced to enforce the covenants of the bond against all the sureties. The mere fact that the obligation arising under the covenant may be enforced severally against all the covenantors does not make the liability of each covenantor distinct. It is true that in enforcement of the claim of the decree-holder the properties belonging to the sureties individually may be sold separately. But that is because the properties are separately owned and not because the liability arises under distinct transactions¹².

139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments

⁹ *Price v. Kirkham*, 34 LJ Ex 35.

¹⁰ *Kanai Prosad v. Jotindra*, 36 C 626 ; *Abid v. Lachma*, 154 IC 814 ; see S. 134 n. 3.

¹¹ *Ward v. National Bank of New Zealand*, 8 AC 755, 764, 765.

¹² *Sri Chand v. Jagadish Pershad*, AIR 1966 SC 1427, 1431.

as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments. A is discharged, by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

1. **The section.**—This section provides for two cases, that of an act on the creditor's part inconsistent with the right of the surety and that of an omission inconsistent with his duty towards the surety, the act or the omission having the effect of impairing the surety's remedy. The section may be contrasted with S. 134. That section, not referring to any duty on the creditor's part, deals with acts or omissions which result in the discharge of the principal debtor; this section with acts or omissions which impair the surety's remedy against the debtor. Compare Negotiable Instruments Act, sec. 40.

"Among the rights of the surety are those for which sections 133, 134 and 135 provide. In the case given in illustration (a) the surety would be discharged under S. 133. Illustration (b) suggests that it is the duty of the creditor to make the best of the securities which he holds, a duty for which further provision is made in S. 141. It suffices to prove negligence or mismanagement, not positive misconduct or wilful negligence"¹³.

2. **Acts inconsistent with rights of surety.**—Where a contractor undertook to perform certain work and it was agreed that the three-fourths of the work, as finished, should be paid for every two months and the remaining one-fourth upon the completion of the whole work, held that the surety for the due performance of the contract was released from his liability by reason of payments exceeding three-fourths of the work done having been made, without the consent of the surety, to the contractor before the completion of the whole work. The material question in such cases always is whether what has been done lessens the security¹⁴. An act of the creditor will operate as a discharge of the surety when by that act the eventual remedy of the surety against the principal is impaired and not where the act instead of impairing the eventual remedy tends to improve it¹⁵. When a decree-holder in an execution proceeding agrees to accept payment of the decretal amount by instalments and accepts a surety bond, which provides that on default in punctual payment execution of the decree would follow, but the decree-

¹³ C. & S. 407-8. *Mutual Loan Assocn. v. Sudlow*, 5 C BNS 449 reff. to on which illust. (b) is founded.

¹⁴ *Calvert v. London Dock*, 2 Keen 638.

¹⁵ *Pogson v. Bank of Bengal*, 3 C 174, 188.

holder omits to apply for execution so that the decree becomes time barred, the action of the decree-holder is something more than mere forbearance in the sense of the term as used in the section and the surety is accordingly discharged¹⁶. Taking of security from a decree-holder in obedience to order of court as a condition for the judgment-debtor's obtaining a stay of execution without the consent of the surety does not release the surety from liability. The section must be read along with S. 141¹⁷. Where a creditor's suit against the debtor is dismissed for default, but subsequently the creditor takes all the steps he can to recover the money from the debtor, he is not guilty of such negligence as disentitles him from proceeding against the surety¹⁸.

3. Omission to do an act.—An omission to insure pursuant to the stipulation of the contract has been held to discharge the surety *in toto*. The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged¹⁹. On a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of his service and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, the surety is discharged, because by so continuing to keep him the employer deprives himself of the right of terminating the service, a right which the surety is entitled in equity to demand of the creditor to have exercised for his own protection²⁰. Where on account of the misconduct of the creditor's agents, the goods deposited as security by the principal debtor fail to satisfy his liability, the creditor has no remedy against the surety¹. Where a person stands surety for any decree that may be passed against four persons, but the plaintiff with the leave of the court proceeds against one of the defendants only, the surety is discharged². Where by reason of certain acts and omissions on the part of the creditor the eventual remedy of the surety against the principal debtor is substantially impaired the surety is discharged³. A surety cannot claim to be discharged for the creditor failing to do an act which it was only optional with him to perform⁴.

Where the surety enters into the contract of suretyship in consideration of something to be done by the creditor, e.g., give notice to the surety of the principal debtor's default, or demand payment from the principal debtor within a stipulated time, if the creditor omits to perform the condition the surety is discharged⁵. Where a surety contracted with a corporation that a

16 *Hazari v. Chunilal*, 8 A 259.

17 *Kunda v. Gopala*, 1949 M 194.

18 *Bharat N Bank v. Thakar*, 16 L 757.

19 *Watts v. Shuttleworth*, 5 H&N 235, 247, 7 H&N 335.

20 *Phillips v. Foxell*, LR 7 QB 666 : 41 LJ QB 293 : 27 LT 231.

1 *Mutual Loan Fund v. Sudlow*, 5 C BNS 449.

2 *Sistla v. Bonthu*, 60 IC 114.

3 *Fulsa v. Natha*, 15 IC 469.

4 *Sankaram v. Dist Board*, 66 MLJ 108.

5 *Lawrence v. Walmsley*, 12 CBNS 799, 808

contractor would execute its work "well and truly", the surety was held not to be discharged upon the contractor doing the work in a defective manner, although it was stipulated that (i) the corporation should have the option of superintending the execution of the work and they did not do so, the reason being that it was a mere matter of passive inaction on their part and not a dereliction on the part of the corporation, and (ii) it was also stipulated that a certain percentage of that contract price should be retained till the engineer gave his final certificate, but it was paid over, the engineer's certificate having been fraudulently obtained. The ground of the decision is that a surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by a fraudulent act or omission against which the surety by the contract of suretyship has guaranteed the employer⁶. Mere negligence in supervision or failure to inform the sureties of embezzlement or delay in making a report to the police, is not sufficient in law to discharge the sureties⁷. There must be active connivance amounting almost, if not entirely, to a fraud. Passive acquiescence by the employer in a slovenly method of accounting by the employee, whose conduct has been guaranteed, will not release the surety⁸. It is well settled that in the absence of any special agreement, a guarantor has no right to control the appropriation by a customer of moneys paid in a bank, subject to the qualification that the banker is bound to deal with the account in the ordinary way of business⁹. After the liability of the surety has become fixed he cannot maintain that the guarantee is discharged merely because a new account is opened by the bank with the principal debtor. It has been laid down in an English case that if there be any agreement between the creditor and the debtor with reference to the contract guaranteed, the surety ought to be consulted, and that if there is any alteration, which is not obviously either unsubstantial or for the benefit of the surety, he is to be the sole judge whether he will remain liable. This is substantially in accord with this section. Where the bank has the means of satisfying an overdraft and yet does not choose to avail itself thereof, the surety will be discharged¹⁰. The section does not apply to the case of a creditor omitting to sue the principal debtor within the period of limitation¹¹.

140. Rights of surety on payment or performance.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is

⁶ *Mayor of Kingston v. Harding*, (1892) 2 QB 494.

⁷ *Sonepat Co-operative Society v. Kapuri*, 16 L 583.

⁸ *Mayor of Durham v. Fowler*, 22 QBD 394, 405. *Dawson v. Lawes*, 23 LJ Ch 434 reld. to; *Ah Yan v. President W.W.C.*, 175 IC 255.

⁹ *Kirby v. Marlborough*, 2 M&S 18 : 105 ER 289 ; *Lysaght v. Walker*, 5 Bl. N. S. 1 : 5 ER 208 HL.

¹⁰ *Ghanapati v. National Bank*, 20 CWN 562.

¹¹ *Shankar National Bank v. Thakar*, 16 L 757. See S. 134 n. 3.

invested with all the rights which the creditor had against the principal debtor.

1. The section.—The rights conferred on the surety by the section and the next follow from the implied promise by the principal debtor to indemnify the surety (see S. 145). It will be noted there is no limitation placed by this section, as is contained in the next, on the surety's right against the principal debtor on payment or performance. These two sections regulate, as against the debtor, the rights of a surety who performs or otherwise discharges the liabilities of the principal debtor. This section lays down a general principle of which the most important practical application is to be found in the next¹².

2. Rights of surety on payment.—Under the section a surety who pays off a debt guaranteed by him must be entitled to all the equities which the creditor could have enforced, not merely against the principal debtor but also against all persons claiming under him. As has been observed in *Heera v. Oozeer*¹³, "he can use every remedy"¹⁴. It includes the right to prove the debt against the insolvent debtor in insolvency proceedings¹⁵. Whoever is liable to pay the debt of another, whether for value, as in the case of a broker who receives a commission for incurring liability to the seller of goods for the buyer's default, or gratuitously as between himself and the person originally and primarily liable, is a surety¹⁶. His general right to stand in the place of the creditor who has been paid off is undisputed; this right is not confined as between the original creditor and the principal debtor. A surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor, whose debts he pays off, could have enforced not merely against the principal debtor but also as against all persons claiming under him¹⁷. Where a surety for one of the parties to an arbitration pays a sum on behalf of the principal debtor, he is entitled to recover the amount from the principal debtor, though the reference to arbitration is void¹⁸. When the surety seeks to enforce his remedy he shall be in the same position as if he were the original creditor still unpaid, so he can avail himself of a remedy which accrued due after the time of his contracting¹⁹. To enable the surety to enforce his right against the principal debtor, (i) the debt must subsist, (ii) his remedy against the principal debtor must remain unimpaired²⁰. The endorser of a negotiable instrument during its currency is not a surety, but after the bills are dishonoured and notice of dishonour has been given to the endorser the endorser is primarily liable as principal on the instrument; though not strictly a surety for the acceptor, he has this

12 *Vyavan v. Official Assignee, Madras*, 63 MLJ 615.

13 21 WR 347.

14 *Krishnasami v. Gopala*, 99 IC 676.

15 *Gopal v. Ganpat*, 11 IC 911.

16 *Imperial Bank v. L. & St. K. Docks*, 5 Ch D 195.

17 *Drew v. Lockett*, 32 Reav 499, 505.

18 *Mir v. Abdul*, 1939 L 187.

19 *Re Lamplough Iron Ore Co.*, (1927) 1 Ch 308; (1926) All ER Rep 682.

20 *Babu v. Manak*, 176 IC 786.

in common with a surety of the acceptor that he is entitled, on paying the holder, to the benefit of the securities and to be put in a situation to have a right to sue the acceptor¹. For payment made by the surety to the decree-holders the surety cannot demand any money from the judgment debtor who were merely *pro forma* defendants in the suit by the creditor against the surety². As to the position of a transferee of a surety's estate charged with the payment of debts and liabilities, see *Anand v. Collector of Bijnor*³.

If a surety pays the whole of the debt, he is entitled to step into the shoes of the creditor and to have for his own benefit any rights which the creditor happens to have against the debtor. The section makes it perfectly clear that these rights accrue when the surety has done *all* that he is liable to do. If the surety does not pay the whole of the debt due to the creditor from the principal debtor, but a part only, he is nothing more than a creditor having a claim upon the principal debtor⁴. When a surety is only surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged⁵. The surety in order to enforce his right against the principal debtor must satisfy two conditions, (i) the debt itself must subsist, (ii) the remedy of the principal must remain unimpaired⁶. A surety who pays the debt of his principal cannot be, so far as the rate of interest is concerned, in a worse position than a stranger who advances his money. He can, therefore, recover interest from the principal debtor⁷.

When a surety has paid off the debt of his principal, not only are all the collateral securities transferred to the surety, but the right is also transferred to him to stand in the place of the original creditor, and to use against the principal debtor every such remedy which the principal creditor himself could have used. Therefore the surety can proceed against the principal debtor upon the instrument creating the debt although the debt has been paid off by himself⁸.

141. Surety's right to benefit of creditor's securities.—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

¹ *Duncan Fox & Co. v. N. & S. W. Bank*, 6 AC 1, 18.

² *Firm Daulat v. Sodhi*, 1949 EP 213.

³ 1932 A 610.

⁴ *Darbari Lal v. Mahbub*, 49 A 640.

⁵ *Grey v. Seckham*, LR 7 Ch 680; *Re Sass*, (1896) 2 QB 12; see next S. note; *Puroate v. Polluri*, 1944 M 195.

⁶ *Rao v. Manak*, 1938 N 413.

⁷ *Sargood's Claim*, LR 15 Eq. 43; *Petre v. Duncombe*, 20 LJQB 242.

⁸ *Hansa Lal v. Oozar*, 21 WR 347; *Krishnasani v. Gopala*, 99 IC 676.

Illustrations

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

1. The section.—The rule laid down in the section may be thus illustrated from English decisions. Where a debt is secured by a surety, it is the business of the creditor, when he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realise the securities and recoup himself the amount of the debt that he has had to pay. A surety will be discharged from his liability as surety if the creditors have put it out of their power to hand over to the surety the means of recouping himself out of the security given by the principal. That doctrine has been clearly expressed in the notes in *Rees v. Barrington*⁹. "As a surety, on payment of the debt, is entitled to all the securities of the creditor whether he is aware of their existence or not, even though they are given after the contract of suretyship, if the creditor, who has had or ought to have had them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands." The surety has a right at any moment to every security held by the creditor at the date of the contract, and he has a further right to say, "you must always hold yourself in a position to be put in motion at my request against the principal debtor"¹⁰. A surety who pays off the debt for which he is the surety must be entitled to all the equities which the creditor whose debts he pays off could have enforced, not merely against the principal debtor, but also against all persons claiming under him¹¹. A similar rule applies to ordinary creditors, for the rule in equity is that "if a creditor holding security sues for his debt, he is under an obligation, on payment of the debt to hand over the security; if having improperly made away with the security, he is unable to return it to his debtor, he cannot have judgment for the debt"¹².

⁹ 2 W&TLC 4 Ed 1002, cited in *Wulff v. Lay*, LR 7 QB 756, 764.

¹⁰ *Newton v. Charlton*, 10 Hare 646; *Chunduri v. Attmuri*, 1936 M 342.

¹¹ *Drew v. Lockett*, 32 Beav 499.

¹² *Bills v. Dean-Johnson*, 1925 AC 489, cited in *Official Assignee v. Hart*, 8 R 46

What are the rights of a surety? The question has been thus answered: When a surety pays a debt, he has the right to be put in the place of the creditor as against the principal debtor and to use all the remedies which the creditor could have used as against the principal debtor, in order that the surety may recover back the sum which he has paid and which the creditor has a right to demand from him¹³. The creditor is entitled to the benefit of all the securities, including any additional security taken by the surety, which the principal debtor has given to his surety, the surety has precisely the same right as the creditor, in fact, stands in his place¹⁴. The principle is that the surety in effect, bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, it is the duty of the creditor to keep the securities in tact and not to give them up or burden them with further advances¹⁵.

The expression "security" in S. 141 is not used in any technical sense; it includes all rights which the creditor had against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for, to the benefits of the rights of the creditor against the principal debtor which arise out of the transaction which gives rise to the right or liability: he is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. If the creditor has lost or has parted with the security without the consent of the surety, the latter is, by the express provision contained in S. 141, discharged to the extent of the value of the security lost or parted with¹⁶. Where a Bank loses goods of value of Rs. 35,690 pledged with it by the principal debtor, the surety is discharged to that extent¹⁷.

2. **Knows of.**—The mere circumstance that the sureties did not know that the creditor held a security would be of no consequence, because sureties were entitled to the benefit of every security which the creditor had against the principal debtor, whether the sureties knew of the existence of those securities or not was immaterial¹⁸.

3. **Extent of surety's rights to securities.**—The rule is laid down in similar terms in English text-books, but sometimes a little more broadly. The Act does not mention when the surety is entitled to have the security made over to him, wholly or in part, whether it is when the debt of the creditor is paid off or when the surety pays the amount of his guarantee. When a surety pays a portion of the debt, for which he is liable under his guarantee, he is entitled to any sums, which the principal creditor may receive as dividends from the estate in bankruptcy of the debtor, paid in respect of

13 *Darrell v. Tibbitts*, 5 QBD 562 : 50 LJ QB 33 : 42 LT 797.

14 *Morley v. St. Alban*, 11 Ves. 22; *Parvate v. Polluri*, 1944 M 195.

15 *Forbes v. Jackson*, 19 Ch D 615 : (1881-85) All ER Rep 863.

16 *State of M. P. v. Kaluram*, AIR 1967 SC 1105, 1108, 1109; *Amrit Lal v. State Bank of Travancore*, AIR 1968 SC 1432.

17 *Amrit Lal v. State Bank of Travancore*, AIR 1968 SC 1432.

18 *Mungho v. Crickett*, 2 Swanst 185.

the portion of the debt which the surety has paid, as laid down in *Ellis v. Emmanuel*¹⁹. This rule is embodied in S. 140, but the question whether a surety who has guaranteed an aliquot and defined portion of a past debt secured by a mortgage is, on payment by him of the portion of the debt which he has guaranteed, entitled to share in such mortgage in proportion to the amount of the debt which he has guaranteed and paid, before the mortgagee has been paid the full amount of his mortgage debt, is different. In such a case the creditor's right to hold his securities until his whole debt is paid is paramount to the surety's claim upon such securities which only arises when the creditor's claim against such securities has been satisfied. If the creditor proves in respect of that portion of the debt which has been paid, he prevents the surety from proving, for double proof in respect of the same debt is not allowed in insolvency and when he receives dividends in respect of such portion, he receives them as trustee for the sureties²⁰. The right of a surety, who has paid a debt, to the securities held by the creditor, depends also upon a principle of equity. The reason of the rule has thus been stated: "I take it to be, because, as between the principal and surety, the principal is under an obligation to indemnify the surety; and it is as I conceive from this obligation the right of the surety to the benefit of securities held by the creditor is derived"²¹. The equity between the creditor and the surety is for the creditor not to do anything to deprive the surety of that right²². A creditor is not bound to exhaust his remedies against the principal debtor before suing the surety²³. A surety by paying off the principal debtor is entitled to the benefit of all securities held by the creditor and can set off against the creditor's claim any sum due to himself from the creditor²⁴. Where the liability of the surety relates to the loan account of the debtor, he is not entitled on satisfying that liability to amount lying in deposit in the Cash Credit Account of the debtor²⁵. If a co-surety obtains any security from the principal debtor, the other co-surety is entitled to the benefit of it²⁶. A surety who pays the debt is entitled to any bond or security given by the principal debtor to the surety²⁷.

4. Discharge of surety.—A surety is discharged if the creditor has so dealt with any security he possesses that he cannot, on payment by the surety, give him all the securities he possesses, whether in existence at the time of the contract of suretyship or subsequently, in the same condition as they were when he first acquired them²⁸. Thus, where landlords advanced money to their tenants on a joint note of the tenants and a surety, afterwards took

19 LR 1 Ex D 157.

20 See *Hobson v. Bass*, LR 6 Ch 792.

1 *Young v. Reynell*, 9 Hare 809, 818.

2 *Goverdandas v. Bank of Bengal*, 15 B 48.

3 *Lachhman v. Bapoo*, 6 Bom. HC ACJ 241.

4 Ex p *Barrett*, 34 LJ Bk 41; *Re Abinash*, 1932 A 262.

5 *Bank of Baroda v. Krishna Ballabh*, AIR Raj 1, 5.

6 *Re Arcedeckne*, 24 Ch D 709, *Steel v. Dixon*, 17 Ch 825; (1881-85) All ER Rep 729 *reid. to.*

7 *Re Walker*, (1892) 1 Ch 621; (1891-94) All ER Rep 888.

8 *Campbell v. Rathbone*, 47 LJCP 144.

a security for this sum as also for another sum advanced at the same time by an assignment of the furniture of the tenants by way of mortgage, then distrained the furniture comprised in the security for arrears of rent, they thereby discharged the surety, for they could not have released the furniture without losing their remedy against the surety⁹. Where a man enters into a contract of suretyship, he bargains that he shall not be prejudiced by any improper dealing with securities to the benefit of which he, as surety, is entitled. This rule is not infringed by a creditor surrendering a policy of life insurance to the trustee in bankruptcy on the policy having already lapsed, for it has then become a mere waste paper and is no security at all. Nor is the rule infringed by the creditor surrendering the security to the trustee in bankruptcy and proving for the whole debt. The creditor is not prevented from pursuing this policy allowed him by the law simply because there happens to be a surety for the payment of that debt¹⁰. If the creditor deals with the securities in a manner warranted by the law, the liability of the surety is not affected thereby¹¹. If there are two or more debts each secured by separate security, the surety for one of the debts is not discharged if the creditor loses or parts with the security or securities relating to other debts¹². A creditor who taking the goods of the debtor in execution afterwards withdraws the execution discharges the surety. If however a surety, after such execution and release, himself promises to pay, he is bound by the promise¹³. If an attachment be withdrawn by the creditor, the surety is discharged to the extent of the value of the property released¹⁴. Where a creditor sues his principal debtor and two sureties upon a mortgage bond and in his plaint formally relinquishes his claim against part of the mortgaged property, after such relinquishment the sureties are no longer bound, their position having altered for the worse¹⁵. But it has been pointed out by Their Lordships of the Privy Council that where in a suit against a principal debtor and his surety, the creditor withdraws the suit against the principal debtor without leave of the court to institute a fresh suit, the creditor is precluded from again suing the principal debtor on the debt, but the debt itself is not discharged and the remedy of the surety against the principal debtor is not impaired¹⁶. The creditor is under the obligation of preserving the securities which he takes from the principal debtor; if any of them be lost by the act or default of the creditor, the surety may be wholly or partially discharged. But the law gives the creditor the right to assign the securities¹⁷. Where *hundies* are given to a bank as security for the money advanced, through its mistake the bank is deprived of the benefit of a part of the security, this does not affect its right to recover on the securities under

⁹ *Pearl v. Deacon*, 1 DG&J 461 : 44 ER 802 : 26 LJ Ch 761.

¹⁰ *Rainbow v. Juggins*, 5 QBD 422.

¹¹ *Taylor v. Bank of N S Wales*, 11 AC 596

¹² *Bank of Baroda v. Krishna Ballabh*, AIR 1975 Raj 1, 5.

¹³ *Mayhew v. Crickett*, 2 Swanst. 185.

¹⁴ *Ram v. Gardhan*, 149 IC 168, see illust. (b).

¹⁵ *Narayan v. Ganesh*, 7 Bom HC ACJ 118 citing *Mayhew v. Crickett*, 2 Swanst. 185.

¹⁶ *Mahanth v. Ba*, 1939 Rang 358 PC.

¹⁷ *Wheatley v. Bastow*, 7 DGM&G 261 : (1843-50) All ER Rep 644.

S. 30 of the Negotiable Instruments Act. The principle laid down in the section, viz., that a creditor having control of a security is 'chargeable with what he might have received from it but for his neglect or wilful default did not apply¹⁸. Where D purchases felled trees from the Government agreeing to pay the price in instalments and S stands surety for D, S stands discharged if D is allowed to remove all the trees after he has paid only one instalment; hence the Government cannot recover the unpaid instalments from S¹⁹.

142. Guarantee obtained by misrepresentation invalid.—Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

The section.—The rule laid down in this section is nothing but an application to the special case of a guarantee of the general rule laid down in section 19. A surety is discharged from liability when a fraud has been practised upon him. Thus, if with the knowledge and assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that but for the same having taking place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void on the ground of fraud²⁰.

143. Guarantee obtained by concealment invalid.—Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustrations

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duty accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

1. The section.—Improper concealment or non-disclosure of facts which ought to be communicated and which would affect the situation of the parties, even if it is not wilful and intentional, affects the suretyship agreement. "The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not on what was passing in the mind of the other party or the motive of the other party. If the facts were such as ought to have been

¹⁸ *Karim v. People's Bank*, 30 IC 35.

¹⁹ *State of M.P. v. Kaluram*, AIR 1967 SC 1105.

²⁰ *Stone v. Compton*, 5 Bing. NC 142, 156 : (1835-42) All ER Rep 659.

communicated, if it was material to the surety that they should be communicated, the motive for withholding them is wholly immaterial. Such non-disclosure, whether it was innocent or not, is misrepresentation¹. A suretyship agreement is not invalidated by the fact that the sureties themselves have been deceived by the very person for whose honesty they vouch².

2. Concealment of material circumstances.—A contract of guarantee, like any other contract, is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently³. Although the doctrine by which *uberrima fides* is required in insurance cases is not applicable to the same extent in suretyship cases, still the surety is entitled to relief on the ground of non-disclosure of matters which ought to have been communicated to him, if the effect of the non-disclosure is impliedly to represent that the thing not disclosed does not exist. Thus, where a surety to a fidelity bond was not told of the previous dishonesty of the employee the surety was not liable for a subsequent act of dishonesty of the employee⁴. But non-disclosure of the fact that a previous surety is withdrawing from the suretyship agreement has been held not to discharge the subsequent surety⁵. It must in every case depend upon the nature of the transaction whether the fact not disclosed is such that it is impliedly represented not to exist⁶. Where fresh sureties furnished security for the manager of a society who had already committed a number of irregularities, of which no mention was made to the sureties, they were not liable. The original sureties were also discharged as they were kept in ignorance⁷. A contract between a principal and a surety is not a contract *uberrimae fidei* requiring the fullest disclosure, though very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid⁸. A surety is not entitled to receive from the creditor a full disclosure of all the circumstances of all the dealings between the creditor and the principal debtor. The test as to what is to be disclosed is, "whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him"⁹; a cash credit account opened with a bank and appropriated to an old debt of the bank does not discharge the surety. With regard to a fact not disclosed the question therefore arises whether the surety would have entered into his contract of guarantee if the

1 *Railton v. Mathews*, 10 Cl&F 934.

2 *Debendra v. Administrator-General*, 33 C 713, 756.

3 *MacKenzie v. Royal Bank*, 1934 AC 455 : 103 LJ PC 81 : 151 LT 486.

4 *London G. Omnibus Co. v. Holloway*, (1912) 2 KB 72 : (1911-13) All ER Rep 518.

5 *N. B. Insurance Co. v. Lloyd*, 24 LJ Ex 14, 18.

6 *Lee v. Jones*, 17 CBNS 482 : 34 LJ PC 131 : 12 LT 122, where non-disclosure of the fact that an agent was in arrear in accounting avoided the guarantee.

7 *Co-operative C.S. v. Udham*, 1944 L 424.

8 *Davies v. L. & P. Insce. Co.*, 8 Ch D 469 : 38 LT 478 : 26 WR 794 : 47 LJ Ch 511.

9 *Hamilton v. Watson*, 12 Cl&F 109, 119. See *N. B. Insce. Co. v. Lloyd*, 24 LJ Ex 14.

non-disclosed fact was disclosed to him¹⁰. Where a person was declared to be the highest bidder at a sale of an abkari farm, but failing to furnish security it was resold at a loss and he was again declared the purchaser, and security was obtained from another person for the due fulfilment of the conditions of the lease, the failure to disclose the amount of loss was not a material part of the transaction in respect of which the guarantee was given¹¹. Where it was agreed between the vendors and the vendees of goods that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors, and the payment of the value of the goods was guaranteed by a third person, but the bargain between the parties was not communicated to the surety, there was a fraud on the surety which rendered the guarantee void¹². Where a person guaranteed the solvency of another, who was surety for the repayment of a loan borrowed at a high rate of interest, about which no mention was made, the non-disclosure of the rate of interest was not material to the risk undertaken, namely, the solvency of the surety, therefore it did not affect the agreement¹³. Where at the date of a guarantee the principal debtor is already indebted to a bank, and this fact is not disclosed to the sureties, the contract of guarantee is not avoided under the section. The balance of authority is that there is a difference between fiduciary guarantees and guarantees by persons in favour of banks. In the former case there may be a duty to disclose all material facts, there is no such duty in the case of a bank, which takes a guarantee from a person to disclose the indebtedness of the person guaranteed at the date of the guarantee.¹⁴

3. **Keeping silence.**—In order that the section may apply it must be proved not only that there was silence as to a material circumstance but that the guarantee was obtained by means of such silence¹⁵. The expression "keeping silence" clearly implies intentional concealment as distinguished from mere non-disclosure. When an employer failed to detect a forgery but there was no suspicion of his honesty, the surety was held not to be discharged by reason of failure of the employer to inform the surety¹⁶.

144. Guarantee on contract that creditor shall not act on it until co-surety joins.—Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

10 *London General Omnibus Co. v. Holloway*, (1912) 2 KB 72 : (1911-13) All ER Rep 518.

11 *Secretary of State v. Nilamekam*, 6 M 406, 410.

12 *Pidcock v. Bishop*, 3 B&C 605 ; see *Davies v. L. & P. M. Insce. Co.*, 8 Ch D 469.

13 *Seaton v. Burnand*, 1900 AC 135.

14 *Imperial Bank v. Avnani*, 53 M 826.

15 *Secretary of State for India v. Nilamekam Pillai*, 6 Mad 406.

16 *Balkrishna v. Bank of Bengal*, 15 B 585 ; see *N. P. Bank v. Giamusk*, (1913) 3 KB 335 : (1911-13) All ER Rep 810.

The section.—When a surety enters into the obligation upon the understanding and faith that another person will also enter into it, he has a right in equity to be relieved on the ground that the instrument has not been executed by the intended co-surety.¹⁷

145. Implied promise to indemnify surety.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety ; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) *B* is indebted to *C*, and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount, *C*, the holder of the bill, demands payment of it from *A*, and on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

1. The section.—Under S. 43 anyone of several joint promisors may be compelled to perform the whole of the promise, the principal debtor and the surety being joint promisors are equally liable to the creditor for payment or performance. This section confers on the surety the right to recover from the principal debtor what he has been compelled to pay to the creditor by virtue of an implied promise in the absence of an express one. This has already been provided for in the Explanation in S. 43. The concluding part of the Explanation has been omitted from this section. S. 126 only defines the contract of guarantee and not its incidents. They are set out in Ss. 140, 141 and 145. There is the general liability of the debtor which may be supported on the ground of the implied promise to indemnify referred to in S. 145 ; and there is the special liability under Ss. 140 and 141 arising from the surety's right to the creditor's original remedy against him. The two grounds of the debtor's liability are distinct. This section carries the rights of the surety against the principal debtor a little further than S. 140. The latter section gives the rights of the creditor. This section makes the principal debtor liable "on an implied contract" for any sum due on the note which the surety has rightfully paid¹⁸.

¹⁷ *Eyre v. Brambridge*, 25 LJ Ch 334 : (1843-60) All ER Rep 170.

¹⁸ *Muthu v. Chitna*, 39 M 965.

2. **Promise to indemnify surety.**—When the guarantee has come to an end and the amount payable under the guarantee has been ascertained, i.e., there is an actual accrued debt for which the surety is liable, the surety acquires the right to compel the principal debtor to pay. To hold the surety entitled at any time to call on the principal debtor to ascertain and pay off the amount due on the current account or that part of it guaranteed by the surety would be inconsistent with the general nature of the transaction¹⁹. In the absence of a contract to the contrary the surety may compel payment by the principal debtor when the debt has become due, whether the surety has been actually sued or not²⁰. But a demand for payment by the creditor is necessary in order that the surety may call upon the principal debtor to pay¹. As soon as the obligation of a surety has become absolute he has a right in equity to be exonerated by his principal². A release by his will by a surety of all debts due to a principal debtor does not bar the executors of the surety to obtain indemnity against the claims of creditors³. It has been observed that the rights of the surety under this section are available to him where the suretyship has been undertaken at the request, actual or constructive, of the principal debtor and not where the surety has intervened between the debtor and the creditor without the principal debtor's knowledge or request, since no one can make himself the creditor of another by volunteering to discharge his obligation⁴. But this view has been criticised on the ground that there can be no contract of guarantee, as distinguished from a contract of indemnity, unless there is privity between the principal debtor and surety, as it is difficult to speak of an implied promise between persons between whom there is no privity of contract. A person cannot make himself the creditor of another by volunteering to discharge the obligations of the other, the rights of the surety against the principal debtor can only arise where the suretyship has been undertaken at the request, actual or constructive, of the principal debtor⁵. A surety cannot claim against the principal debtor the cost of a litigation in which he attempted to show that he has been discharged as between himself and the creditor. Such a litigation is purely for the benefit of the surety and must be paid for by him. When an order of winding up has been passed, payment of interest made by the surety or the company cannot be admitted to proof⁶. Where a suit by the creditor is dismissed against the debtor but a decree is passed against the sureties and he has to pay the amount, he can recover it from the debtor⁷. A surety bond has to be strictly construed. The section

19 *Morrison v Barking Chemicals Co.*, (1919) 2 Ch 325; *Ascherson v. Tredegar Dry Dock*, (1909) 2 Ch 401; (1908-10) All ER Rep 510 *referred to*.

20 *Wooldridge v. Norris*, LR 6 Eq 410.

1 *Bradford v Gammon*, (1925) 1 Ch 132; (1924) All ER Rep 766.

2 *Bechervaise v. Lewis*, LR 7 CP 372; *N. C. Bank v. Akili*, 1948 M 252, *Re Mitchell*, (1913) 1 Ch 201; (1911-13) All ER Rep 187.

3 *Re Mitchell*, (1913) 1 Ch 201; (1911-13) All ER Rep 187.

4 *Muthu v. Chinna*, 39 M 965.

5 *Periamanna v. Banians & Co.*, 49 M 156.

6 *Hughes' Claim*, LR 13 Eq 623.

7 *Maroti v. Hussain*, 89 IC 63.

only applies if the sureties are personally liable, it has no application where the bond creates a charge on the property⁸.

3. **Paid.**—The word “paid” in the section means an actual payment in money or by transfer of property and not merely the incurring of a pecuniary obligation in the shape of a bond, promissory note, or acknowledgement of liability⁹. The fact that the principal debtor has been released and the liability has been adjudged by a decree does not amount to a payment¹⁰.

4. **Debtor liable to surety though the creditor’s claim against him is barred.**—Though the claim against the principal debtor is barred, it may not be barred against the surety. A surety may effectively keep alive his liability by his own act, e.g., by *bona fide* payments of interest within time, when the remedy of the creditor may have become barred as against the principal debtor on account of limitation. The liability of the principal debtor to indemnify the surety is in no way dependent upon the existence of his original liability to the creditor¹¹.

5. **Limitation.**—Art. 182 (5) applies to a surety for satisfaction of a decree by a judgment-debtor. Liability of the surety arises upon failure of the principal judgment-debtor to pay¹².

146. Co-sureties liable to contribute equally.—Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary are liable, as between themselves, to pay each an equal share of the whole debt or of that part of it which remains unpaid by the principal debtor.

Illustrations

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

1. **The section.**—This section deals with the apportionment between co-sureties of the obligation which a surety has been called upon to discharge

⁸ *Jayappa v. Shivangouda*, 30 Bom LR 19, 32.

⁹ *Nur Samand v. Fajja*, 76 IC 759; *Putti v. Marimuthu*, 26 M 322 fold; *Mutuwamy v. Konar*, 14 R 511, 1936 R 235.

¹⁰ *Amoar v. Gulam*, 50 IC 611.

¹¹ *Raghavendra v. Mahipat*, 49 B 202; per contra *Suja v. Pahlwan*, 30 PR 1473.

¹² *Sadamaia v. Indra*, 1935 M 183.

towards the creditor. In the leading case of *Dering v. Winchelsea*¹³, cited in *Wolmershausen v. Gullick*¹⁴, a surety by bond for £4,000 to the Crown had judgment against him at the suit of the Crown for nearly the whole amount. He claimed contribution against co-sureties bound by distinct bonds to the same creditor to secure the same liability of the same debtor, *held*, there should be contribution between these sureties though bound under distinct contracts of suretyship without privity of contract between themselves. The right to contribution depends primarily, not upon contract, but upon the equitable principle that, *in equali jure*, the law requires equality—the charging one surety discharges the other, each therefore ought to contribute to the onus. The doctrine of contribution stands upon this; that all sureties are equally liable to the creditor and it does not rest with him to determine upon whom the burden shall be thrown exclusively; that equality is equity; and, if he will not make them contribute equally the court will finally by arrangement secure that object. It has been long settled that, if there are co-sureties by the same instrument and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this court either upon a principle of equity or upon contract to call upon his co-surety for contribution¹⁵. Sureties for the same principal and for the same engagement, although bound by different instruments and for different amounts, have a common interest and a common burden; so that if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties whose obligation to the creditor he has discharged. It is clear that one surety cannot keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement. Where the effect of a material alteration in the bond is to discharge the surety making the alteration, the co-surety is also discharged. If one of the joint sureties becomes insolvent the right to contribution remains against the other co-sureties who must bear the whole burden¹⁶. The cases of average in equity rest upon the same principle¹⁷. The rule that a surety on payment has a right to avail himself of the securities which the creditor has never applies to a person who becomes surety for a debt and security is given by the debtor to the same creditor for another debt. A surety for part of a debt is also not entitled to the benefit of a security given by the debtor to the creditor at a different time and for another part of the debt¹⁸. There is to be equality of burden and of benefit which has been explained to mean¹⁹ that “where the same default of the principal renders all the co-sureties responsible all are to contribute and then the law superadds that they should all contribute equally

13 1 Cox 318; 2 Bos & P 270.

14 (1893) 2 Ch 514, 522.

15 *Craythorne v. Swinburne*, 14 Ves 160: (1803-13) All ER Rep 181; *Kemp v. Finden*, 13 LJ Ex 137.

16 *Ellesmere Brewery v Cooper*, (1896) 1 QB 85. (1895-99) All ER Rep 1121.

17 *Stirling v. Forrester*, 3 BH 575.

18 *Wade v. Coope*, 2 Sim 155.

19 *Steel v. Dixon*, 17 Ch. D 325: (1881-85) All ER Rep 729.

if each is a surety to an equal amount ; and, if not equally, then proportionately to the amount for which each is a surety. The rule has been thus stated in *Story*¹ : "Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal but they are also entitled to the benefit of all securities which have been taken by any of them to indemnify himself against such liabilities". A surety in order to escape liability may take up the plea that the co-surety has not executed the security agreement. A defence by a surety of the non-execution of the security by the co-surety to succeed, it must be proved that there was an agreement between the creditor and the surety that such co-surety should execute, or, that the surety executed, on the faith of others doing so¹. There is no real authority for the proposition that the creditor is entitled to the benefit of all securities given by the principal debtor to the surety. The surety, therefore, who takes from the principal debtor a bond or indemnity does not become a trustee of that for the creditor. On the other hand, the other doctrine is well established, namely, that the surety who pays the debt is entitled to stand in the place of the principal creditor². A surety who has received from the principal debtor a counter-security for the liability which he undertakes jointly with others is liable to bring in for the benefit of his co-sureties whatever he has received from that source³. Where sureties are bound by the same instrument as the principal debtor, a suit lies by one surety against another for contribution. Such a suit is cognisable by the Small Cause Court⁴.

2. Co-surety's liability to contribution.—If one surety is called on to pay the whole debt he is entitled to have contribution from his co-surety. Of course, in order to determine whether persons are sureties, so liable to contribute or stand in any other relation, the court may look to the very transaction itself without regard to the form of the instrument by which the relationship is created⁵. The right of a surety to claim contribution arises on actual payment by him of more than his share⁶. A surety has no claim against his co-sureties until he has paid more than his share of the debt due to the principal debtor⁷.

In the ordinary case of principal and surety as the creditor acquires a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation ; therefore, a judgment against the surety for the full amount guaranteed, but who has yet paid nothing to the

20 11 Ed. 499.

1 *Traill v. Gibbons*, 2 F&F 358.

2 *Re Walker*, (1892) 1 Ch 621 : (1891-94) All ER Rep 888.

3 *Muthusami v. Rayalu*, 82 IC 395.

4 *Hari v. Abasaheb*, 4 B 321.

5 *Reynolds v. Wheeler*, 30 LJCP 350.

6 *Davies v. Humphreys*, 6 M&W 153 : (1835-42) All ER Rep 101, cited in *Wolmerhausen v. Gullick*, (1893) 2 Ch 514, 525 : (1891-94) All ER Rep 740.

7 *Davies v. Humphreys*, 6 M&W 153 : (1835-42) All ER Rep 101, cited in *Ex p Snowden*, 17 Ch D 44, 48 ; *Stirling v. Burdett*, (1911) 2 Ch 418 : 81 LJ Ch 49.

creditor, entitles him to maintain an action against a co-surety for contribution towards the common liability⁸. The right to contribution is not affected by the fact that the surety was ignorant that there were other sureties⁹. In equity the right to contribution as against a solvent co-surety is the same whether the other sureties are solvent or insolvent¹⁰. In *McKewan's case*¹¹, the solvent sureties were held on appeal not liable under the circumstances of the case to pay a further proportion to make up for the deficiency of the insolvent sureties. The claim of a surety against his co-sureties carries interest because there is a contract, express or implied, to indemnify; therefore, he is to be put in the same position as if the act against which he is to be indemnified has been done by the persons who are to indemnify at the time when it ought to have been done¹². As to the mode of participation by the co-sureties in the securities obtained and brought forward by a surety see *Berridge v. Berridge*¹³. Where sureties liable for different amounts agreed to discharge the debt, upon the true construction of the agreement it was held that the parties intended to pay off the debt in equal shares but not to vary the extent of their liabilities for contribution *inter se*¹⁴. Under the English rules of procedure in a suit by a creditor against the surety, a co-surety or the principal debtor may be added as a defendant and he may defend the suit¹⁵. Also a surety suing his co-surety for contribution must either prove the insolvency of the principal debtor or make him a party to the action¹⁶. A surety who has satisfied a judgment obtained by the creditor against the debtor and his sureties may stand in the place and use the name of the creditor in enforcing contribution from a co-surety¹⁷. A surety, however, may stand in the position of a principal debtor in relation to the ultimate surety and consequently may be debarred from claiming contribution¹⁸. The liability of a co-surety to contribute may be negated by express agreement¹⁹.

147. Liability of co-sureties bound in different sums.—Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

8 *Wolmershausen v. Gullick*, (1893) 2 Ch 514 (1891-94) All ER Rep 740, law clearly stated

9 *Craythorne v. Swinburne*, 14 Ves 160

10 *Hitchman v. Stewart*, 3 Drew 271 : 61 ER 907 · 24 LJ Ch 690

11 6 Ch D 447.

12 *Ex p. Bishop*, 15 Ch D 400, 421; *Hitchman v. Stewart* 24 LJ Ch 690 : 61 ER 907 : 3 Drew 271.

13 44 Ch D 168.

14 *Arcedekne v. Howard*, 45 LJ Ch 622; *Ellesmere Brewery v. Cooper*, (1896) 1 QB 75 : (1895-99) All ER Rep 1121.

15 *Callender v. Wallingford*, 53 LJQB 569.

16 *Hay v. Carter*, (1953) 1 Ch 397.

17 *Re Mc. Myn*, 33 Ch D 575.

18 *Re Denton's Estate*, (1904) 2 Ch 178.

19 *Re Denton's Estate*, (1904) 2 Ch 178.

Illustrations

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are each liable to pay 10,000 rupees.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

The section.—“This section is in the nature of a proviso to the preceding section. It provides for the case where several sureties make themselves responsible for the same debt, but up to a limited amount only (see note to Sec. 128). The rule laid down is that subject to the limit fixed by his guarantee, each surety is to contribute equally” and not proportionately to the liability undertaken²⁰.

²⁰ C. & S. 422. See *Arcedeckne v. Howard* 45 L.J. Ch. 622 cited under §. 146 a. 2.

CHAPTER IX

OF BAILMENT

148. "Bailment", "bailor" and "bailee" defined.—A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

1. The section.—A bailment implies that there is reserved to the bailor the right to claim a redelivery of the property deposited in bailment. Whenever there is a delivery of property under a contract for an equivalent in money or some other valuable commodity, and not for the return of the identical subject matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment¹. Thus, delivery of promissory notes to a treasury officer for consolidation and cancellation is not a bailment, for the notes are unconditionally surrendered and not made over for a temporary purpose upon the accomplishment of which they are to be returned or disposed of according to the directions of the bailor². The leading case is that of *Coggs v. Bernard*³, where the classification of bailments in six sorts has been adopted from Roman law. But in modern English law a distinction is maintained only between two kinds of bailments, voluntary and involuntary (see S. 150). The Act is not exhaustive. It contains no definition of a deposit which is a species of bailment. Involuntary bailees can be described as depositaries⁴.

2. Characteristics of bailment.—Characteristics of bailment as defined in the section are : (i) it consists in the delivery of goods, (ii) for some purpose, (iii) upon a contract, (iv) that they shall, when the purpose is accomplished, be returned or otherwise disposed of, (v) according to the directions of the

1 *S. A. Insurance Co. v. Randell*, LR 3 PC 101 cited from Sir W. Jones.

2 *Secretary of State v. Sheo Singh*, 2 A 756

3 1 Sm LC.

4 *Promatho v. Prodymno*, 26 CWN 772.

person delivering them. Delivery of possession is essential. If there be a transfer of ownership the transaction may be a sale or exchange but is not a bailment (see above). The word "goods" implies that there can be a bailment of movable property only. A bailment consists in the delivery of an article upon a condition or trust. Every bailment need not necessarily be in itself a contract. It is perfectly true that in almost all cases a contract, either express or implied, accompanies a bailment, but there may be a complete bailment without a contract. The promise or contract to restore the goods is not the bailment itself but a contract that arises out of it. The law usually implies upon a bailment a contract to redeliver when there is not an express promise to do so⁵. The obligations which a mere lender of chattel for use contracts towards the borrowers are in some degree correlative⁶. Independently of any (English) statute, the relation between a driver and a cab proprietor who hands over the horse and cab to the charge of the driver, to be used by him for the purpose of plying for hire at his own discretion and not subject to the proprietor's control, is that of bailee and bailor, but by statute the relation is that of master and servant⁷. Where the court passed an order for the redelivery of a mare that had been attached by virtue of the order, the relation of bailor and bailee was established between the parties⁸. Entrusting a person with goods for safe custody is a form of bailment⁹.

Money paid into a bank to the credit of a current account does not constitute a bailment¹⁰. The distinction between a loan and a deposit is that in the latter case there is something partaking of the nature of a trust or at any rate fiduciary relations¹¹.

A bailee's duty to deal with the goods of the bailor according to the bailor's orders arises on the receipt of the goods though the orders might have been previously given¹². Ordinarily a seller is not a bailee. He has a lien for the price, a right of resale, and a right of cancelling the contract if the buyer does not perform his part¹³. Where a railway servant is entrusted with a waterproof coat on condition that if it is damaged or lost it will be renewed at his cost, it is a case of bailment, but by special contract the servant is responsible for the loss, so Ss. 151 and 152 do not apply¹⁴. Where goods or precious stones are given to a jeweller to be converted into ornaments, the intention is that these very articles are to be used for the purpose,

⁵ *Queen v. Mc. Donald*, 15 QBD 323 : (1881-85) All ER Rep 1063, see *Ashby v. Tolhurst*, (1937) 2 KB 242 ; in *The Queen v. Ashwell*, 16 QBD 190, 223 a bailment is spoken of as a contract.

⁶ *Blackmore v. B. & E. Ru.*, 27 LJQB 167, 172.

⁷ *Venables v. Smith*, 2 QBD 279.

⁸ *Fazal v. Salamat*, 120 IC 421.

⁹ *Visalakshi v. Nidhi*, 1942 M 299.

¹⁰ *Davendra v. Gulab*, 1946 N 114.

¹¹ *Dorabji v. Muncherji*, 19 B 352 ; *Ishur v. Jibun*, 16 C 25. art 60 applied.

¹² *Streeter v. Horlock*, 1 Bing. 34.

¹³ *Parakh v. Mackenzie & Co.*, 1934 O 380.

¹⁴ *Nga Aung v. Emperor*, 148 IC 814, the servant is liable to conviction under S 408 read with S. 151 IPC.

as a case of bailment arises¹⁵. When there is no obligation to return the identical subject matter, there can be no bailment¹⁶.

There can be bailment and the relationship of a bailor and a bailee in respect of specific property without there being an enforceable contract. Nor is consent indispensable for such a relationship to arise. A finder of goods of another has been held to be a bailee in certain circumstances. Customs authorities are in the position of a bailee in respect of the goods seized¹⁷.

149. Delivery to bailee how made.—The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

1. Delivery to bailee.—Railway companies receiving passengers' luggage in a cloakroom are liable not as carriers but as bailees. In a contract of bailment the bailee may impose whatever terms he chooses if he gives notice to the bailor that there are special terms and furnishes him with the means of knowing what those terms are, and if the bailor chooses to make the bailment he is bound by them¹⁸. Where a waiter in a restaurant takes charge of the coat of a customer without being asked to do so, there is a bailment¹⁹. Where delivery is not complete, e.g., where any act remains to be done by the bailor which would have the effect of putting the goods in possession of the bailee, bailment does not arise and the bailee is not liable for the loss. Thus, the giving of a particular number by a railway clerk to a consignor does not amount to delivery of the goods or their acceptance by the railway company²⁰. It is an essential element of Ss. 148 and 149 that there must be the putting into the possession of the bailee or of his agent of the goods in question. A delivery of a document of title for safe custody is not equivalent to the delivery of the goods it represents. The person to whom the document is delivered is responsible for its safe custody but not for that of the goods¹. Delivery may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee, but the mere leaving of a box in the room of the defendant, when the plaintiff himself takes away the key of that room, cannot amount to delivery².

150. Bailor's duty to disclose faults in goods bailed.—The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with:

¹⁵ *Sitla v. Baijnath*, 161 IC 417.

¹⁶ *Re Gangaram*, 1943 N 168.

¹⁷ *State of Gujarat v. Menon*, AIR 1967 SC 1885, 1888.

¹⁸ *Van Toll v. S. E. Ry.*, 12 CBNS 75, 84.

¹⁹ *Ultzen v. Nicols*, (1894) 1 QB 92; (1891-94) All ER Rep 1202.

²⁰ *Lachmi Narain v. B. E. C. I. Ry.*, 45 A 235.

¹ *Dulichand v. Jwala*, 148 IC 644.

² *Kati v. Vimala*, 175 IC 343.

the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

1. The section.—The duty of a bailor for hire is more onerous than that of a gratuitous bailor. The latter is liable if he is aware of defects in the goods bailed which expose the bailee to extraordinary risks, the former is liable whether he is aware of the defects or not.

2. Bailor's duty to disclose faults.—With regard to illustration (a) it has been said: "Would it not be monstrous to hold that if the owner of a horse, knowing it to be vicious and unmanageable, should lend to one who is ignorant of its bad qualities and conceal them from him, and the rider using ordinary care and skill, is injured, he should not be responsible?" A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant while using it, from its defective state, if the lender was not aware of it.

Where the owner of a chattel lets it out for hire, "the nature of the contract is such that an obligation is imposed on the party letting for hire to furnish that which is proper for the hirer's accommodation³; he in fact warrants the chattel to be in a fit condition to be used for the purpose in which it is going to be employed; it, therefore, involves a duty of an examination of the chattel with due care and skill"⁴. Thus, a person letting out a carriage for hire for a specific purpose enters into an implied contract that the carriage so let out is fit for the purpose for which it is hired and it is negligence in anyone to let out a carriage without previously taking care to ascertain that it is reasonably safe⁵. The owner would be guilty if he could be charged with negligence, i.e., if he failed in his obligation to take due care to ascertain whether there was any defect in the chattel let out, but he could

³ *Blackmore v. B. & E. Ry.*, 27 LJQB 167, 172.

⁴ *MacCarthy v. Young*, 6 H&N 329 : (1843-60) All ER Rep 1073.

⁵ *Sutton v. Temple*, 12 M&W 52, 60.

⁶ *Oliver v. Saddler*, 1929 AC 524; *Vogan v. Oulton*, 21 LT 435.

⁷ *Jones v. Page*, 15 LT 619; *Banfield v. Goole*, (1910) 2 KB 24; (1900-10) All ER Rep 799.

not be compelled by law to make reparation for an accident arising from a latent defect in the chattel which no human skill or care could either have prevented or detected⁸. Persons sending dangerous articles by a carrier are bound to give notice of their character; if they fail to do so, they are responsible for the probable consequences of their neglect⁹. Where there is a contract relating to a specific thing there is no specific undertaking that it shall be reasonably fit for the purpose for which it is hired or is to be used¹⁰.

A bailee for hire is ordinarily bound to return the article hired at the end of the period for which it is hired. The Act says nothing as to what is to happen if it is found that the article is not fit to be used for the purpose for which it has been hired. No doubt there is an implied warranty when an article is hired for use that it is fit to be used for that purpose; if there is a breach of warranty then there is no liability to pay the hire. It seems, however, that the bailee can leave the article where it is and give notice to the bailor that there is a breach of warranty, he is not bound to return it to the bailor¹¹. But when a person contracts for hire and use of a specific article, it has been held that there is no implied warranty by the owner that it is fit for the purpose for which it is required. He undertakes to deliver it in the state agreed for, and the hirer takes the risk of its fitness for his purpose¹².

151. Care to be taken by bailee.—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

1. The section.—The legislature in this section makes no reference to the distinction between a gratuitous bailee and a bailee for hire, and, omitting reference to skill, lays down for both one standard, viz., as much care as a man of ordinary prudence would take of his own goods in similar circumstances¹³. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of property entrusted to him as a reasonably prudent and careful man fairly be expected to take of his own property of the like description¹⁴. The duty of a bailee for hire is no greater¹⁵. He is under a legal obligation to

⁸ *Readhead v. Midland Ry.*, LR 4 QB 379, 393; (1861-73) All ER Rep 30.

⁹ *Farrant v. Barnes*, 11 CBNS 553; *Lyell v. Ganga Dai*, 1 A 60 FB.

¹⁰ *Robertson v. Amazon Tug Co.*, (1881) 7 QBD 598, Bramwell LJ dissenting.

¹¹ *Isufeli v. Ibrahim*, 45 B 1017.

¹² *Bharat v. B. L. Pictures*, 177 IC 540.

¹³ *Secretary of State v. Ramdhare*, 150 IC 151, cf. Indian Trusts Act, S. 27.

¹⁴ *Giblin v. Mc. Millen*, LR 2 PC 317, 339; *Shanti v. Tara*, 1933 A 152.

¹⁵ *Stuart v. Lowrick*, LR 9 QB 122.

exercise the same degree of care towards the preservation of the goods entrusted to him from injury, which might reasonably be expected from a man in his position acquainted with the risks to be apprehended either from the character of the business itself or of its locality; and that obligation includes not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or have actually occurred¹⁶. A gratuitous bailee is bound to exercise such skill as he possesses where his profession or situation is such as to imply the possession of competent skill and is liable for the neglect to use it¹⁷. In the case of an ordinary bailment for mutual consideration the bailee must use reasonable or ordinary care in the custody of the article bailed. He is responsible for the acts of his servants acting within the scope of their employment as also for their negligence, but he is not responsible for the acts of persons who are not his servants or for acts of servants not acting within the scope of their employment¹⁸. A bailee is liable for loss arising out of the negligence of his own servants, or even of those of the bailor if at the time of loss they were under the power or control of the bailee¹⁹. The law is that for all acts done by a servant in the conduct of his employment, and in furtherance of such employment, the master is liable although the authority given by him is exceeded²⁰. The act of the servant in such cases must be acts committed within the scope of the servant's authority and in the course of his employment or otherwise an act of necessity for which the consent of his master must be implied¹. The master is not liable if the act of the servant be the result of a private dispute between the servant and a third party², or be outside the scope of the servant's employment³.

When goods are placed in the custody of a bailee and are lost while in his custody, in order to exonerate himself from liability he must show some circumstance which negatives the idea of negligence on his part⁴; for the loss is *prima facie* evidence of the bailee's negligence, therefore the burden lies on him to disprove negligence. The section makes no distinction between a gratuitous bailee and a bailee for hire, and, omitting all reference to skill, lays down for both one standard⁵. Where a bundle containing Rs. 430 entrusted by the plaintiff to the defendant was lost, the plaintiff having kept it for a short while in an unlocked box, the principal was not liable. The test under the section to be applied is the care which a man of ordinary prudence

16 *Brabant & Co. v. King*, 1895 AC 632, 640.

17 *Wilson v. Brett*, 11 M&W 113 : 152 ER 737.

18 *Sanderson v. Collins*, (1904) 1 KB 628 : *Secretary of State v. Ramdhan*, 58 CLJ 98.

19 *Leggott v. Normanton*, 98 LJKB 145 : (1928) All ER Rep 468.

20 *Dyer v. Munday*, (1895) 1 QB 742; see *Lloyd v. Grace Smith & Co.*, 1912 AC 716 : (1911-13) All ER Rep 51.

1 *Beard v. London G. Omnibus Co.*, (1900) 2 QB 530 : (1900-03) All ER Rep 112.

2 *Ward v. General Omnibus Co.*, 42 LJCP 265.

3 *Cheshire v. Bailey*, (1905) 1 KB 237, cited in *Uma v. Secretary of State*, 18 Lah 380.

4 *Phipps v. New Claridge's Hotel*, 22 TLR 49; *Sitla v. Baijnath*, 161 IC 417; *Madras Port v. Home Insurance Co.*, AIR 1970 Mad 48, 55.

5 *Secretary of State v. Ramdhan*, 58 CLJ 98.

would take under the circumstances⁴. When a person deposited plaintiff's money to his own account in a bank, and the bank failed, he would not be liable to the plaintiff as he took exactly the same care of the plaintiff's money as he did of his own⁷. Where, however, the plaintiff left a brooch in a shop, the assistant made it over to the shopkeeper who left it in a drawer, but it was not forthcoming when demanded by the owner, the shopkeeper was guilty of negligence as a bailee and was liable in damages⁸. But where a goldsmith took necessary care for the safety of silver given him by a customer, and it was lost, he was absolved from liability⁹. The bailee is liable if through his negligence injuries are occasioned to a third person¹⁰. The question of burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for him to give a *prima facie* explanation in order to shift the burden of proof to the person who seeks to make him liable¹¹. It is open to a bailee to contract himself out of the obligations imposed by the section¹². A bailee is liable for loss occurring through his negligence but not for accidental loss. A bailee may, however, protect himself from his liability even against loss by negligence by special contract¹³, or by such contract may make himself liable for loss arising through accident. Thus, a promise by the hirer to pay for the goods hired in case of their destruction by fire is not void¹⁴. A bailee may thus protect himself by special conditions in the contract; but he cannot rely upon these conditions intended only to protect him in the fulfilment of his duties, if he has broken the contract, by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which he contracted to keep it¹⁵. The amount of care specified by sec. 151 cannot be modified by a contract. Where a bailee, e.g., a launderer, accepts an article on condition that he shall not incur any liability in respect of any damage which may occur, the bailee can recover damages for the loss, destruction or deterioration of the thing bailed on account of his failure to take the minimum care specified in sec. 151¹⁶. A bailee is bound to take special measures of precaution to guard the thing bailed when he sees a

danger approaching¹⁷. Warehousemen, as bailees, must do what is reasonable. They are not insurers. They are entitled to recover from bailors the sum paid by them on goods which are stolen from their custody¹⁸.

The contract made by a general carrier of passengers for hire with a passenger is to take due care (including in that term the use of skill and foresight) to carry the passenger safely; there is no warranty that the carriage in which he travels shall be in all respects perfect for its purpose, i.e., free from all defects likely to cause peril¹⁹.

2. Negligence.—Negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances or in the omitting to do some act which a person of ordinary care and skill would do under the circumstances²⁰. The test to be applied in determining whether there has been any negligence or not is the care taken by a prudent man¹. Where a contract of bailment contains a clause exempting the bailee from liability in the absence of wilful neglect or default, the bailee cannot be held liable for any loss or damage caused by his gross carelessness, because gross carelessness cannot be regarded as wilful neglect or default². Gross negligence means nothing more than a great and aggravated degree of negligence as distinguished from a negligence of a lower degree³. Gross negligence may be defined as the culpable failure to exercise that degree of care and prudence which it is reasonably necessary to avoid injury to others. In proof of gross negligence all that is necessary to show is not direct and positive fraud but lack of good faith in the sense of due care and attention⁴. In English law a gratuitous bailee is liable for gross negligence whereas a bailee for hire is liable for ordinary negligence. It will be seen that this distinction has not been adopted by the Contract Act which requires the same degree of care from both kinds of bailees⁵. There is no question that under the English law bailees are liable for negligence on the part of their agents or servants, committed in the course of their employment about the use and custody of the thing bailed, but not on account of an unauthorised act done outside the scope of their employment. It has been pointed out that the law is the same in this country also⁶. A clause in the invoice form of a car repairer that the repairer will not be liable for damage caused by fire does not exclude his liability for damage caused by a fire which breaks out on account of his negligence⁷.

17 *Leck v. Maestaer*, 1 Camp 138.

18 *Brook's Wharf v. Goodman*, (1937) 1 KB 534 : (1936) 3 All ER 696.

19 *Redhead v. Midland Ry.*, LR 4 QB 379.

20 *Bridges v. N. L. Ry.*, LR 7 HL 213, 232.

1 *Vaughan v. Menlove*, 6 LJCP 92 : (1835-42) All ER Rep 156.

2 *Kenyan, Son & Craven v. Baxter Hoare*, (1971) 2 All ER 708.

3 *Doorman v. Jenkins*, 2 A&E 256, 261, 262 : (1824-34) All ER Rep 364.

4 *Gangappa v. Imamuddin*, 154 IC 904.

5 But see *Uma v. Secy. of State*, 18 Lah 380.

6 *Secretary of State v. Ramdhan*, 150 IC 189.

7 *Hollier v. Rambler Motors (AMC) Ltd.*, (1972) 1 All ER 399 CA.

3. **Innkeeper.**—In the absence of any statute law dealing with the subject in this country, the common law in England should be applied, if it be found applicable to Indian society and the circumstances of the case. But the liabilities of a hotel-keeper to guests are now regulated by this Act and, in the absence of any specific agreement in a given case, the rules in this chapter will apply. The question in such a case resolves itself into one of facts, viz., whether the hotel-keeper took such care of the goods as was required by this section⁸. He is not an insurer of the person or the goods of the guest⁹. In the absence of express agreement a guest at a hotel is not liable to compensate the owner for the loss, destruction or deterioration of hotel furniture used by a guest, if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own. Ordinary prudence is the test. Where a guest in a hotel died of cholera and the hotel-keeper destroyed the furniture in the room, the court observed that it was for the hotel-keeper to give some evidence that the guest did not take as much care of the goods as a person of ordinary prudence would have taken under similar circumstances, and no such evidence having been given the defendant, who was the husband of the deceased guest, was not liable to the hotel-keeper¹⁰.

4. **Carriers by sea.**—Carriers by sea for hire are not common carriers and the Carriers Act, 1865, does not apply to them. The duties and liabilities of common carriers including those by sea are governed by the English common law except where they have been departed from in the case of some classes of common carriers by the Carriers Act III of 1865 or the Railways Act IX of 1890. English common law rules apply to contracts of carriage of goods by sea. It is therefore open to a carrier to protect himself by appropriate clauses in the bill of lading from liability for all kinds of loss or damage¹¹. Carriers by sea in India are not entitled to the benefit of the Carriers Act¹². The word 'carrier' in its general sense means a person or company that undertakes to transport the goods of another person from one place to another for hire. Steamship companies are carriers but not common carriers. In the case of continuous carriers when goods have to be carried with the aid of different transport agencies in order to arrive at the destination to which they are booked, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction on portions beyond his own system or in consequence of acts or defaults of persons other than his own servants; and the consignor cannot hold the company with which he did not contract liable for damages when all that is complained of is

8 *Jan & Sons v. Cameron*, 44 A 735; *Carpenter v. Haymarket Hotel*, (1931) 1 Ch 364; (1930) All ER Rep 525.

9 *Winckworth v. Raven*, (1931) 1 KB 652.

10 *Rampal v. Murray & Co.*, 22 A 164.

11 *Kumber v. B. I. S. N. Co.*, 38 M 941; see *I. G. S. N. Co. v. Bhagwan*, 40 C 716; *Orient S. S. Co. v. K. S. S. Co.*, 1951 Trav Coch 1.

12 *Boggiano Co. v. Arab Steamers*, 40 B 529.

non-feasance, though such company may be liable in tort for the breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another¹³. Carriers whose steamers navigate in inland rivers are common carriers. A difference of opinion has arisen as to whether a foreign company can be regarded as common carriers. The High Court of Calcutta has held that they cannot be¹⁴, but the Madras High Court has held to the contrary and has laid down that, whatever the nationality of the carriers, the law applicable to them is the *lex loci contractus*. The onus of disproving negligence by the Carriage of Goods by Sea Act (26 of 1925) rests on the carrier. Unless the onus is discharged the carrier is responsible for loss or damage¹⁵.

5. Common carriers.—The duties and liabilities of common carriers in India are governed by the principles of the common law of England. This is recognised by the Carriers Act III of 1865, and the Contract Act was not intended to alter the law applicable to common carriers. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward¹⁶. The rights and liabilities of common carriers, being outside the Contract Act, are governed by the principles of the English common law as modified by the Carriers Act. A common carrier, therefore, in India is subject to two distinct classes of liability, one, for loss for which he is liable as an insurer, the other, for loss for which he is liable under his obligation to carry safely¹⁷. The liability of a common carrier under the Carriers Act is that of an insurer and is different from that of a bailee under Ss. 151, 152 and 162 of this Act. An inland steamer company is a common carrier¹⁸. That a common carrier has the liability of an insurer does not mean that there is any privity of contract between the owner and the carrier. The carrier has to make good the loss because he makes a breach of the law by failing to carry safely. The word insurer is used as simile¹⁹. The onus of proving negligence when goods entrusted to a carrier are lost is not on the consignor²⁰. In the case of common carriers under S. 9 of the Carriers Act, on non-delivery of goods, the burden of proving absence of negligence rests on the carriers¹. When after goods have been carried to their destination by carriers they are refused by consignees, the carriers become involuntary bailees and are liable not as carriers but only for negligence².

¹³ *Mylappa v. B. I. S. N. Co.*, 34 MLJ 553.

¹⁴ *Mackillican v. Compagnie des M. M.*, 6 C 227.

¹⁵ *Hajes Ismail v. Compagnie des M. M.*, 28 M 400, fold in *Kumber v. B. I. S. N. Co.*, 38 M 941; *Malabar S. S. Co. v. Dada*, 55 CWN 11.

¹⁶ *Irrawaddy Flotilla Co. v. Bugwandas*, 18 C 620 PC; see *Mothoora v. I. G. S. N. Co.*, 10 C 166 FB.

¹⁷ *British & F. M. Insce. v. I. G. N. Ry.*, 38 C 28

¹⁸ *I. G. S. N. Co. v. Bhagwan*, 40 C 716.

¹⁹ *Dhar v. Ahmed*, 37 CWN 559.

²⁰ *I. G. S. N. Co. v. Gopal*, 41 C 80, 87-88.

¹ *R.S.N. Co. v. Choutmull*, 26 IA 1, on app. from 24 C 786

² *Heugh v. L. & N. W. Ry.*, LR 5 Ex 51; *Chapman v. G. W. Ry.*, 5 QBD 278 : (1874-80) All ER Rep 1209.

6. Carriers by railway.—A carrier is bound to use all reasonable care to get the article to the destination in time but is not liable if prevented by unforeseen or inevitable circumstances not attributable to his default³. The Indian Railways Act, 1890, reduces the responsibility of carriers by railway to that of bailees under the Contract Act. It declares that nothing in the common law of England or in the Carriers Act shall affect the responsibility of carriers by railway. The liability of a common carrier as an insurer is an incident of the contract between the common carrier and the owner of the property to be carried⁴. Railways, therefore, whether controlled by the State or not, are carriers, though not common carriers for the purposes of the Carriers Act⁵. Under S. 72 (1) of the Railways Act the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration for carriage has been declared to be that of a bailee under Ss. 151, 152 and 161 of the Contract Act⁶. Therefore the liability of a railway company must be measured solely by the test formulated in Ss. 151 and 152 of this Act. When goods have not been delivered to the consignee at the place of destination, the plaintiff need not prove how the loss occurred; the burden lies upon the bailee to prove the existence of circumstances which exonerate him from liability or loss. The railway company accepting goods for transmission is not in the position of insurers as common carriers⁷. S. 76 of the Railways Act is not by any means the same as S. 9 of the Carriers Act. A railway company as bailee cannot inevitably be held liable for every accident of which it is unable to assign the precise cause. The obligation of a railway company includes not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks have actually occurred⁸. If a railway company, being prevented by Act of God from carrying out and delivering according to contract, adopts a different route, attended with risk not contemplated in the contract, the company is liable⁹. When the loss of goods entrusted to bailees is established it lies on the latter to show that they took as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care, i.e., that there was no evidence of negligence on the part of their servants. If

3 *Hawes v. S. E. Ry.*, 54 LJQB 174.

4 *Irrawaddy Flotilla Co. v. Bugwandas*, 18 IA 121; *Mothoora v. I. G. S. N. Co.*, 10 C 166 *apprvd.*, *Kuverji v. G. I. P. Ry.*, 3 B 109 *not supported.*

5 *Secretary of State v. Golab*, (1937) 2 Cal 614, Art 30 of the Limitation Act applies to railways.

6 The section cited in *Toonya Ram v. E. I. Ry.*, 30 C 257; see *Sohan v. E. I. Ry.*, 44 A 218 FB.

7 *Surendra v. Secretary of State*, 38 IC 702; *Arratoon v. E. I. Ry.*, 38 IC 143; *Tyabji v. S. B. Insee. Co.*, 42 IC 636.

8 *Lakhichand v. G. I. P. Ry.*, 37 B 1; *Hirji Khetsey & Co. v. B. B. C. I. Ry.*, 39 B 191; *Dwarkanath v. R. S. N. Co.*, 27 CLJ 615 PC; *Brabant v. King*, 1895 AC 632, 640.

9 *Kishanlal v. B. B. C. I. Ry.*, 1938 All 888.

they fail to satisfy the court on that point they are liable for the loss¹⁰. Where, however, a railway company did not make reasonable provision for the protection of the goods, or for the extinguishing of any fire that might break out, it was negligent and therefore was held liable as a bailee¹¹. It is the duty of a railway company to use due and proper care and skill in conveying passengers and it will be liable for negligence in their use. It is not the law that in case of carriers of passengers there exists an express duty to carry them safely¹². Where goods were consigned for despatch to a railway company and a part was lost, the court observed that the care that the railway company was to take under this section was the same care that a man of ordinary prudence would take of the single consignment. It cannot involve considerations arising from the volume of the railway business¹³. If they take the amount of care referred to in the section, no responsibility attaches to them for the loss, destruction or deterioration of the goods bailed¹⁴. The words "loss or destruction" in S. 75 (1) of the Railways Act IX of 1890 include loss caused by criminal misappropriation of the consignment by a servant of the railway administration in charge thereof¹⁵. A station master never definitely directing the consignor to remove the goods, or telling him in unmistakable terms that the goods were being kept on the railway premises at his own risk, and at the same time never definitely accepting the goods at railway risk, is deemed to have accepted the bailment of the goods on behalf of the railway company and under S. 72 of the Railways Act the company is responsible for the custody of the goods; as bailee the company is bound to take such care of the goods as it would have taken of its own goods of a similar nature and is bound in damages for loss resulting from its negligence¹⁶. A railway company is not liable for damage caused by fire if it has done what a reasonable and prudent man would have done to save his own property. The company is not bound to show the origin of the fire and that it is itself free from any negligence in the matter¹⁷. Where the railway places sufficient material to show that proper and requisite precautions were taken by them to provide against any damage as may result from rainfall, the mere fact that the rain water did enter into the wagon causing damage to the consignment is itself not sufficient to give rise to the inference that adequate precautions were not taken and that damage was caused due to negligence on the part of the railway¹⁸. A railway company is not liable for goods damaged by a mob.

10 *Trustees of the Harbour, Madras v. Best*, 22 M. 524, 537; *Secretary of State v. Afzal*, 56 IC 714; *Tolaram v. Secretary of State*, 152 IC 562; *Gauri Mal v. Secretary of State*, 91 IC 963; *Moolji v. B. N. Ry.*, 1932 C 257; *G. G. in Council v. G. S. Mills*, 28 Pat 621.

11 *Secretary of State v. Sheo*, 34 ALJ 387.

12 *E. I. Ry. v. Kalidas*, 28 IA 144.

13 *B. N. W. Ry. v. Bansidhar*, 92 IC 603.

14 *Forbes Campbell v. Secretary of State*, 159 IC 591.

15 *Balaram v. S. M. Ry.*, 19 B 159.

16 *Muema v. E. I. Ry.*, 82 IC 772.

17 *Moolchand v. G. I. P. Ry.*, 102 IC 433; *Moolji v. B. N. Ry.*, 1932 C 257.

18 *Union of India v. Hukumchand*, AIR 1970 MP 55.

Even if the consignee refuse to take delivery of the goods, the company remains liable as a bailee¹⁹.

The fact of loss or damage of goods is enough to cast upon the railway company the burden of proving that the loss was not due to any negligence on its part. The standard of negligence is given in Ss. 151 and 152, but no general rule universally applicable can be laid down as defining the amount and quality of the proof in every case which will discharge the railway company's onus. A decree ought not to be given against a railway company the moment it admits that it is unable to assign the real cause of the loss. The company may, in the last resort, exonerate itself in two ways. It may show that (i) although unknown, the cause must have been external to itself and beyond its control, or (ii) although unknown and in all probability attributable to itself the cause was of such a nature that it could not have foreseen and prevented it. Evidence may be adduced to establish either of these two things²⁰. It is sufficient for the plaintiff to prove the delivery of the goods to the railway company and the fact that the goods were destroyed whilst in the custody of the company. These facts being established it is for the company to establish the circumstances which would entitle it to be relieved from liability. The responsibility of a railway company for the loss or destruction of the goods delivered to it for carriage is, subject to the other provisions of the Act, that of a bailee under Ss. 151, 152 and 161¹. But an agreement may be made limiting this responsibility. It is quite clear that a railway company, when goods are tendered to it for carriage, cannot hold an inquest as to the rights of the person delivering to deal with the goods, the property in them, and the authority given by the owner to the person presenting them for carriage. Nor it is the legal duty of a railway company to see whether the person delivering the goods is ignorant or not, or to see that he reads and understands before he signs, though the contract by an illiterate man may not be binding on him². By S. 54 of the Railways Act, a railway administration may impose conditions not inconsistent with the Act with respect to the receiving, forwarding or delivering of any animals or goods. Thus, in consideration of carriage at a special reduced rate a railway company may contract to be held harmless and free from all responsibility for any loss, destruction or damage to the consignment from any cause whatever³. The word 'loss' in S. 77 of the Railways Act means loss by the railway and not simply loss to the railway⁴. It includes non-delivery or loss to the plaintiff⁵.

19 *Jusaf v. G. General*, 1948 N 65

20 *Hirji Khetsey & Co. v. B. B. & C. I. Ry. Co.*, 39 B 191; *Gauri Mal v. Secretary of State*, 91 IC 963; *Secretary of State v. Ramdhan*, 58 CLJ 98

1 *Nanku v. I. M. Ry.*, 22 A 361

2 *G. I. P. Ry. v. Chakravarty Sons*, 55 C 142.

3 *Tippanna v. S. M. Ry.*, 17 B 417, *Moheswar v. Carter*, 10 C 213 fold; *E. I. Ry. v. Bunyad Ali*, 18 A 42; *Toonya Ram v. E. I. Ry.*, 30 C 257; *Arunachellam v. M. Ry.*, 33 M 120; *Narain v. E. I. Ry.*, 34 A 656; *E. I. Ry. v. Nilkanta*, 41 C 576; *E. I. Ry. v. Shiv Prasad*, 17 CWN 529, authorities refd. to; *E. I. Ry. v. Kanak*, 44 IC 491.

4 *Badri Prasad v. G. I. P. Ry.*, 22 ALJ 897.

5 *Sheo Dayal v. G. I. P. Ry.*, 49 A 236.

Notice to the railway company is essential when a consignor desires compensation for the loss, destruction or deterioration of animals or goods. No notice is necessary where goods are withheld by the railway company and are not proved to have been lost⁶. "Generally speaking, when a carrier fails to deliver articles of merchandise in the ordinary course and the goods come to a fallen market, the difference between the market value of the goods at the time they would have been sold if they had been carried according to contract and their market value at the earliest period at which they could have been brought to the market after the delivery to the consignee will be the measure of damages recoverable"⁷. When a railway company undertakes to carry goods from a station on its railway to a place on another distinct railway with which it communicates, this is evidence of contract with the receiving company for the whole distance, and the other railway company will be regarded as its agent and not as contracting with a bailor. A receipt given by a railway company for goods to be sent to a place on another railway and there to be delivered for an entire sum is one entire contract for the whole distance and constitutes an entire contract with the railway which gave the receipt⁸. When a steamship company was doing a particular set of journeys for a railway company on account of a breach on the railway line, the steamship company could not be regarded as departing from its usual business and engaged in the business of sub-contractor for the railways in such a special sense as to take it *quoad* the journey out of the avocation of a common carrier. A common carrier cannot divest himself of his responsibilities as such without satisfying the court that in the particular transaction he acted in some other capacity or by special terms under S. 6 of the Carriers Act⁹. Where in a consignor's suit for damages it was found that the railway company had examined the wagon, had placed the goods in a wagon reasonably fit for the purpose with a fireproof iron roofing, had been careful not to put any inflammatorv goods with the consignment, when the fire was discovered had done what a reasonable and prudent man would have done to save his own property, the railway company was absolved from liability to the consignor for the loss the company's liability being governed by Ss. 151 and 152¹⁰.

7. Risk note.—The risk note is simply an indemnity by the sender for the benefit of the company. It cannot in itself affect the rights of the consignee. The latter is obviously entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage¹¹. The responsibility of a railway company as bailee is limited by agreement contained in the risk note. Loss means 'loss of goods by the railway

6 *Badri Prasad v. G. I. P. Ry.*, 22 ALJ 897

7 *Arjundas v. Secretary of State*, 85 IC 786

8 *Chunni Lal v. Nizam's G. S. Ry.*, 29 A 228, 231; *I G N. R. Co. v. Girdharilal*, 54 C 430; *Motilal v. B. P. T. Ry.*, 1939 A 649.

9 *India G. N. R. Co. v. Dekhari Tea Co.*, 26 Bom LR 571, 575 PC.

10 *Moolchand v. G. I. P. Ry.*, 25 ALJ 730.

11 *R. K. Ry. v. Imail*, 29 IC 207; but see *E. I. Ry. v. Nilkanta*, 41 C 576.

company' and not 'pecuniary loss to the consignor'¹². In the case of a contract for carriage under a risk note it is for the railway company to prove that the loss was due to causes contemplated by the note. When that has been done the onus will be shifted upon the consignor to show that the loss had arisen owing to the wilful neglect or misconduct of the company or their servants¹³. But in *Sheo Narain v. E. I. Ry. Co.*¹⁴, it has been laid down that the initial burden is on the consignor to prove non-delivery. On such proof the burden would be shifted to the railway company to show that there was no "wilful neglect" but that the company took all reasonable precautions. A railway company carrying goods under a risk note is liable for damage for delay caused by unnecessary deviation from the ordinary route¹⁵. In the case of a consignment under a risk note the onus lies on the plaintiff to show that he comes within the proviso, because the contract expressly absolves a railway company from the liability imposed upon it by the ordinary law, except under certain particular circumstances and it is for the plaintiff to show that he comes within the exception¹⁶. But it has been pointed out in *Janaki Das v. Secretary of State*¹⁷ that the company's liability as a bailee remains unaffected by the risk note which only limits its responsibility in a certain way. Therefore, the burden of proof will be the same as if the risk note has not been signed, the burden of proving that proper precautions had been taken accordingly rests on the railway company¹⁸, but the case of an inland steamer company is different¹⁹.

The general liability of a railway company in India is not the liability of a common carrier under the English Common Law but is the liability of a bailee; in other words, the railway company is not an insurer but is under the duty of taking a certain measure of reasonable care. The risk note exempts the company from liability for certain things except in certain special cases. The railway company, in order to claim the benefit of the immunity granted it by the risk note, must prove that there has been a loss, and the initial burden of proof lies on the company. It will be then for the consignor to show that the loss was due to the wilful neglect of, or theft by, the railway's servants²⁰. Risk note H does not afford any protection to the railway company in a case where a bale has been tampered with and goods abstracted therefrom when it was originally received by the company in a good condition¹. Such a risk note absolves the company from liability unless it is proved that the loss was due either to wilful neglect or to theft by a servant of the railway

12 *Jolli v. Dominion*, 1949 C 380.

13 *G. I. P. Ry. v. Jitan Ram*, 2 Pat 442, see cases reld. to ; *E. I. Ry. v. Nathmal*, 39 A 418; *Sheobarut v. B. N. Ry.*, 16 CWN 766

14 50 A 246.

15 *Janaki Das v. Secretary of State*, 85 IC 114.

16 *Sheobarut v. B. N. Ry.*, 16 CWN 766.

17 85 IC 114.

18 *Sheo Narain v. E. I. Ry.*, 50 A 246; see *Secretary of State v. Jhaddu*, ALJ 995.

19 *I. G. S. N. Co. v. Bhagwan*, 40 C 716.

20 *G. I. P. Ry. v. Jesraj*, 55 C 132.

1 *Secretary of State v. Bhagwan*, 49 A 889.

company². Where goods under risk note H were lying on the platform and there caught fire and it was found that the means of extinguishing fire were not as they ought to be, this was evidence of neglect but not of wilful neglect³. In case of a consignment sent under risk note, form A, the onus is on the consignor to prove wilful negligence of the railway company or misconduct of its servants. Where damage is caused by delay the railway company is not protected by the risk note. But it has been pointed out that though Risk Note A confers exemption from liability in respect of the condition of goods at the time of delivery at destination, it does not confer immunity in a case of total non-delivery of goods⁴.

The responsibility of a railway company is that of a bailee as laid down in Ss. 151, 152, 161, subject to any special agreement such as is contained in risk note form B. A consignor who has executed a note in that form has no claim for destruction or deterioration of, or damage to, the consignment. Where there is short delivery the railway company must give evidence that the goods delivered are lost before they can claim the benefit of the risk note⁵. A railway company is bound to reweigh a consignment before delivery is taken at the request of a consignor in a case in which there is no risk note⁶. Where a consignee demanded "open delivery" and there was delay in giving such delivery and the price of *ghee* fell in the meantime so that the consignee suffered loss, *held*, such loss was not covered by the indemnity clause in risk note form B⁷.

152. Bailee when not liable for loss, etc., of thing bailed.—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

1. The section.—A bailee is not an insurer of goods. He is not responsible for loss caused by accident. He must show when goods bailed are lost that there was no negligence or default on his part. It is his duty, therefore, to take steps to recover the goods. If he can inform the owner in time he must do so : if he cannot, he must act as an agent of necessity and take the steps which a reasonable owner would take in defence of property of the value in question⁸. No proposition of law can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it

² *C. I. S. & W. Co. v. G. I. P. Ry.*, 47 B 155.

³ *Ardeshir v. G. I. P. Ry.*, 26 ALJ 545 ; see *R. v. Senior*, (1899) 1 QB 283 : (1895-99) All ER Rep 501, for meaning of wilful neglect cited in above.

⁴ *E. I. R. Ry. v. Gopi*, 21 ALJ 448 ; *G. G. in Council v. G. S. Mills*, 28 Pat 621.

⁵ *E. I. Ry. v. Kishin Lal*, 21 ALJ 438 ; *E. I. Ry. v. Makhan*, 21 ALJ 515. For procedure to be adopted in the event of a dispute arising in a case coming under the proviso to Risk Note B see *Surat C. S. & W Mills v. Secretary of State*, 41 CWN 337 PC.

⁶ *Bhullan Mal v. Secretary of State*, 52 A 126, see S 60.

⁷ *Secretary of State v. Madhuri*, 55 A 625.

⁸ *Goldman v. Hill*, (1919) 1 KB 443 : (1918-19) All ER Rep 434.

against a wrong-doer, the latter by virtue of his possession, the former by virtue of his property⁹. A bailee is bound to take reasonable means to protect his bailor's property. "In a case of a loss, the onus is on the bailee to prove that it occurred through no want of ordinary care on his part"¹⁰. A bailee is liable in damages for loss occasioned by negligence. The case is governed by Art. 115¹¹. The degree of care required of a bailee depends upon and varies with the nature and condition of the thing. "A man of ordinary prudence would not send his own goods in a boat with 20 or 30 leaks on its side 1 or 1½ inches in length, and keep the goods in the hold of the boat for 30 hours"¹². Where the creditor is guilty of laches in dealing with negotiable securities accepted from a debtor, his debt would be satisfied to that extent¹³. An exemption clause in a written contract of bailment exempting the bailee from liability for any loss sustained by the thing bailed cannot be availed of by the bailee if the bailee performs his part of the contract in a manner not contemplated by the parties. For instance, if the garage attendant promises to keep the car locked up, but fails to do so and a valuable property is stolen from the car, the theft will not fall within the exemption clause and hence the bailee will be liable¹⁴.

The right of the bailee in possession to sue cannot depend upon the fact or extent of his liability to the bailor. As between a bailee and a stranger possession gives title, that is, not a limited interest, but absolute and complete ownership, therefore, the bailee is entitled to receive back from the wrong-doer a complete equivalent for the loss or deterioration of the thing itself, which he must account for to the bailor. What the bailee has received above his own interest he has received to the use of his bailor. The wrong-doer having once paid full damages to the bailee has an answer to any action by the bailor¹⁵. It would be against all notions of justice that the bailee who recovers the full value of the goods wrongfully taken out of his possession should be able to retain it for himself¹⁶. "The law is that a person possessed of goods as his property has a good title against every stranger, and that one who takes them from him, having no title in himself, is a wrong-doer, and cannot defend himself by showing that there was title in some third person for against a wrong-doer possession is a title"¹⁷.

In a contract of bailment if the goods perish without any fault of the bailee he is not liable for failure to redeliver¹⁸. A case of sale on approval or on

9 *Manders v. Williams*, 4 Ex. 339, 344 : (1843-60) All ER Rep 545.

10 *Ranson v. Platt*, (1911) 2 KB 291 ; *Travers v. Cooper*, (1915) 1 KB 73, 88 : (1914-15) All ER Rep 104.

11 *Holloway v. Holland*, 1933 O 518.

12 *Lakshminarain v. Secretary of State*, 27 CWN 1017.

13 *Camidge v. Allenby*, 6 B&C 373.

14 *Mendelssohn v. Norman Ltd.*, (1969) 2 All ER 1215.

15 *Winkfield*, 1902 P 42 : (1900-03) All ER Rep 346, law elaborately discussed, *Claridge v. S. S. Tramway Co.*, (1892) 1 QB 422 overruled ; see *Rooth v. Wilson*, 1 B&A 59.

16 *Eastern Construction Co. v. National Trust Co.*, 1914 AC 197, 210 ; *Armory v. Delamirie*, 1 Sm. LC : (1558-1774) All ER Rep 121.

17 *Jeffries v. G. W. Ry.*, 5 E&B 802, cited in *Jawahar v. Punjab N. Bank*, 17 Lah 668.

18 *Coggs v. Bernard*, 1 Sm' LC : (1558-1774) All ER Rep 1.

trial is of an analogous nature. In such a case there is no sale until approval is given, therefore upon the accidental destruction of the goods without any fault on the part of the purchaser he is not liable to make good the loss¹⁹. The burden of proof is on him that the loss occurred at a particular time, i.e., before default on his part²⁰.

Upon a bailment a duty arises at common law on the part of the bailee not to be negligent in respect of the bailor's goods, independently of any contract, and upon a breach of such duty the latter can maintain an action in tort. But if his cause of action is that the defendant ought to have done something or taken some precaution which could not be embraced by the common law liability arising out of the relation of bailor and bailee, then he is obliged to rely on a contract within the meaning of the rule, and the action is one founded upon contract¹. A bailee is liable under the section only for negligence, the standard of which is defined in S. 151. Any words absolving him from risk must cover the consequences of negligence². A bailee is not entitled to add a new term exempting him from liability for negligence during the subsistence of the contract³.

2. **Deterioration, etc.**—The words "loss destruction or deterioration" in the section obviously refer to something which happens while the goods are still in the possession of the bailee. The word 'loss' must mean loss by the bailee and not loss to the owner⁴. The word 'deterioration' is wide enough to include depreciation in value on account of a fall in the price of the goods when by mistake or negligence of its servants goods consigned to a railway company are diverted from the ordinary route and there is delay and deterioration, the company is liable for deterioration due to unreasonable delay caused by the deviation; such a cause not being provided for in risk note B, the railway company is not protected by it. The measure of damages is the difference between the market price on the date on which the goods ordinarily should have arrived and that on the date when they did arrive; and interest can be claimed on the amount from the latter date⁵. A bailee can limit his liability by making a special contract⁶, in the case of a railway company this is done by the various risk notes. A car is left in a parking ground and a ticket is given, there is no implied condition that the car should not be parted with without the production of the ticket⁷.

19 *Elphick v. Barnes*, 3 CPD 321; *Ellis v. Mortimer*, 1 Bos & PNR 257; *Head v. Tattersall*, LR 7 Ex 7 reld. to.

20 *S. of S. v. Kesho*, 1932 A 584.

1 *Turner v. Stallibrass*, (1898) 1 QB 56

2 See *Mac Cawley v. F. Ry*, 42 LJQB 4; *Rutter v. Palmer*, (1922) 2 KB 87; (1922) All ER Rep 367.

3 *Lakhaji v. Boorugu*, 1939 B 101.

4 *Secretary of State v. Jiwan*, 21 ALJ 220.

5 *G. I. P. Ry. v. Jugul*, 52 A 238

6 *Fut v. Po*, 120 IC 899; *Ashby v. Tolhurst*, (1937) 2 KB 242.

7 *Ashby v. Tolhurst*, (1937) 2 KB 242.

153. Termination of bailment by bailee's act inconsistent with conditions.—A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

1. The section.—“This and the following section are for the protection of the bailor whose goods are being used by the bailee in a manner inconsistent with the conditions of the bailment. The bailor may, under such circumstances, determine the bailment, although it has been created for a specified purpose which has not been accomplished, or for a definite term which has not expired. According to English law, if a hirer of goods sells them, his interest is determined and the owner may recover them against a *bona fide* purchaser...The duty imposed by this section on the bailee is imposed on the trustee by Sec. 51 of the Trusts Act”⁸.

A bailee of goods for hire, by selling them, determines the bailment⁹. But a replying by the pawnee does not determine the bailment. A pawn is a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged¹⁰. Under the English common law, on a wrongful sale by a bailee to a *bona fide* vendee the bailment is determined and the bailor may recover from the purchaser¹¹. In the case of a bailment on general principles of law and also under this section the liability of the bailee, whether the bailment is gratuitous or for consideration, arises if he does any act with regard to the goods bailed which causes loss to the bailor. On the death of the bailee his estate is liable for the loss¹².

154. Liability of bailee making unauthorised use of goods bailed.—If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

⁸ C&S 435-36. Cf. S. 108 (c), Transfer of Property Act.

⁹ *Cooper v. Willomatt*, 1 CB 672; (1843-60) All ER Rep 556.

¹⁰ *Donald v. Suckling*, LR 1 QB 585.

¹¹ *Singer Mfg. Co. v. Clark*, 5 Ex D 37; (1874-80) All ER Rep 952.

¹² *Jwalaadutt v. Banailal*, 115 IC 707 FC.

Liability for unauthorised use.—This section makes a bailee liable for the unauthorised use of goods bailed. "It is immaterial that the damage is not the direct or immediate result of the deviation from the conditions. The liability to make compensation arises, whatever be the nature of the bailment, whether for the benefit of the bailor or bailee, whether paid or gratuitous"¹³. Thus, if an accident occurred at a time and place while a ship was on her deviating course, the shipowner would be responsible, unless he could show that the loss or damage would have occurred if she had been on her proper course¹⁴. Where, however, the owner of a chattel retains himself the right of control, though the chattel is placed at the disposal of another, the owner will be liable for damage caused to a third person by negligence in its management¹⁵. In common law the making use of goods bailed in deviation of the conditions of bailment, is not only a breach of contract but is also a tort for which an infant may be made liable although he cannot be used for breach of contract¹⁶. If a bailee of a car uses it for his own purposes, he is liable to make compensation to the bailor for any damage arising to it for or during such use¹⁷. Where a bailee has wrongfully disposed of goods bailed, and has thus determined the bailment, any person, who however innocently obtains possession of the goods of the bailor who has been fraudulently deprived of them, whether for his own benefit or that of any other person, is guilty of conversion¹⁸. Where certain jewels were deposited as collateral security for two promissory notes, and the promisor sold them without proper notice to the debtor, the debtor would be entitled to claim deduction from the amount due on the notes of a reasonable value of the deposited jewels¹⁹.

155. Effect of mixture, with bailor's consent, of his goods with bailee's.—If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Effect of mixture.—Where goods of two owners are mixed together, by consent or by accident, the owners of the goods so mixed become tenants in common of the whole, in the proportion which they have severally contributed to it²⁰. But if a person wilfully mixes and confuses goods which he holds with those of another, so that he cannot "distinguish what was his own, the whole must be considered as belonging to the other"¹. Where they can be separated S. 156 will apply.

¹³ C&S 437.

¹⁴ *Morrison & Co. v. Shaw Savill*, (1916) 2 KB 783, 800.

¹⁵ *Samson v. Aitchison*, 1912 AC 844.

¹⁶ *Burnard v. Haggis*, 14 CBNS 45 : 32 LJCP 189 : 8 LT 320.

¹⁷ *Hafizullah v. Montague*, 156 IC 354.

¹⁸ *Barker v. Furlong*, (1891) 2 Ch 172, 183.

¹⁹ *Ma Me v. Chettyar*, 1933 R 76.

²⁰ *Spence v. Union M. Insce.*, LR 3 CP 427, 437, cited in *Smurthwaite v. Hannay*, 1894 AC 494, 505; (1891-94) All ER Rep 865; *Bombay Co. v. Karachi Port Trust*, 42 IC 659.

¹ *Lupton v. White*, 15 Ves. 432, 439, 440 : (1803-13) All ER Rep 356.

156. Effect of mixture, without bailor's consent, when the goods can be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark; A is entitled to have his 100 bales returned, and B is bound to bear all the expenses incurred in the separation of the bales, and any other incidental damage.

157. Effect of mixture without bailor's consent when the goods cannot be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs 25 a barrel. B must compensate A for the loss of his flour.

The section.—It is a well-established doctrine in the English Courts that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so that they cannot be separated with perfect accuracy, he is liable for the whole². The reason is, as explained by Blackstone, that English "law, to guard against fraud, gives the entire property without any account to him whose original dominion is invaded and endeavoured to be rendered uncertain without his own consent."

158. Repayment by bailor of necessary expenses.—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

159. Restoration of goods lent gratuitously.—The lender of a thing for use may at any time require its return, if the loan was

² *Cook v. Addison*, LR 7 Eq 466, referring to *Lupton v. White*, 15 Ves 432 : (1803-13) All ER Rep 254

gratuitous even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

The section.—"While the section gives the lender generally the power of withdrawing the loan, it imposes upon him the obligation of indemnifying the borrower in those cases, in which the loan being withdrawn might leave the borrower worse off than he was originally". The provision is probably suggested by Story³, "there seems to be no express authority on the subject in English law"⁴.

160. Return of goods bailed on expiration of time or accomplishment of purpose.—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed without demand, as soon as the time for which they were bailed, has expired, or the purpose for which they were bailed has been accomplished.

The section.—The rule has been thus stated: Wherever a specific chattel is entrusted by one man to another, either for the purpose of safe custody or for the purpose of being disposed of for the benefit of the person entrusting the chattel, then, either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material⁵. Government accepting a G. P. note deposited by a company as security must return the note to the bailor without demand after the transaction is over. The fact that some third person has an interest is no ground for refusal to return it⁶.

A man may make a special contract to deliver up property to the pledgor under any circumstances, and may in that way render himself liable to an action for a breach of contract for not restoring a chattel. In the absence of any such special contract, a party with whom an article is pledged undertakes to return it to the pledgor, provided it turns out not to be the property

³ *Bailments*, S. 258.

⁴ C&S 441.

⁵ *Re Hallet's Estate*, 13 Ch D 696, 710, 722 (1874-80) All ER Rep 793.

⁶ *Ezekiel v. Province*, 1939 C. 746.

of another⁷. For refusing to deliver goods entrusted to a person for safe custody the bailor is entitled to sue at election, either for a wrongful parting with the property (if he discovers and can prove it), or for a refusal by the bailee to deliver after having made a demand. The Statute of Limitations in the latter case runs from the date of demand and refusal and not from the date of sale⁸. Where the plaintiff lost a watch which later on was deposited with the defendant by a third person, the plaintiff was informed of this fact, and sometime after, the plaintiff's agent demanded its return but the defendant refused to hand over the article to him, there was no wrongful refusal by the bailee to return, so the plaintiff had no cause of action⁹.

If the article hired be not fit to be used for the purpose for which it is hired, all that the bailee is bound to do is to give notice that there has been a breach of warranty. He cannot be under any liability to pay the hire¹⁰. When goods are let out on hire, the executor of the deceased hirer is bound to return them on the expiry of the term for which they have been bailed (S. 160). If he fails to do so he will be guilty of conversion to his own use from the time he should have returned them in response to the demand made for them. In an action for the conversion of chattels, the full value of the chattels at the time of the conversion is the measure of damages. A bailor delaying in bringing a suit is not entitled to damages for the use of the goods over and above the value of the goods¹¹. When a person borrows an article he must be deemed to have made an implied contract for the return of the goods to the lender as soon as the time for which "the article was bailed has expired". He must be deemed to have made an implied contract for the return of the goods to the lender without demand. The distinction between a deposit and a loan is that a deposit is to be kept by the deposittee for the depositor while the loan is to be kept by the borrower for himself¹².

161. Bailee's responsibility when goods are not duly returned.—If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Bailee's responsibility when goods are not returned.—Where chattels are delivered to a bailee in good condition and are lost, or are not returned, or are returned in a damaged state, the law presumes negligence to be the cause and casts upon the bailee the burden of showing that the loss is consistent with due care on his part¹³. The obligation of a bailee is contractual obliga-

7 *Cheesman v. Excell*, 20 LJ Ex. 209.

8 *Wilkinson v. Verity*, LR 6 CP 206, refd. to in *Miller v. Dell*, (1891) 1 QB 468.

9 *Clayton v. Le Roy*, (1911) 2 KB 1031 : (1911-13) All ER Rep 284.

10 *Isufalli v. Ibrahim*, 45 B 1017.

11 *Mehter v. Balthazar*, 34 IC 297.

12 *Chaturgun v. Shahzady*, 126 IC 682.

13 *Kush Kanta v. Chandra Kanta*, 28 CWN 1041, see if failure be due to act of State or act of God ; *Hafizullah v. Montague*, 156 IC 354.

tion and springs only from a contract of bailment. Government does not occupy the position of a bailee in respect of stolen property recovered by it, so is not liable to indemnify the owners in case of loss of such property due to the negligence of its servants¹⁴. A passenger losing his luggage deposited in a cloak-room, in the absence of conditions limiting the liability, is entitled to the entire value of the goods lost, but not to any consequential damages¹⁵. Where plaintiff delivered certain goods to A on sale or return, and A delivered them to B on the same terms, and B to C in whose custody the goods were lost, *held*, A was liable to the plaintiff for the conduct of B and C, as he would be deemed to have adopted the transaction by doing something inconsistent with his power to return the goods¹⁶. In an action for detention of goods, if they are delivered up after institution of suit, the plaintiff cannot have judgment to recover them or their value, but he may have judgment to recover damages for their detention if the plaintiff has sustained any damage, otherwise not; if part be delivered he may have judgment to recover the residue or their value and damages for their detention¹⁷. A bailee who fails or refuses to deliver up goods to the bailor when demanded by the latter is liable for the loss of the goods, "as the loss has actually happened whilst his wrongful act was in operation and force"¹⁸. Delivery of goods by the railway company cannot be said to have been given at the proper time within the meaning of the section when 9 days were taken for the purpose instead of two days which was the ordinary time¹⁹. In the absence of a risk note as provided in S. 72 of the Railways Act a railway company will be responsible as a bailee for delay in delivering goods²⁰. Although a rule of a railway company prescribes that a company will not be liable for loss when no receipt has been given, yet it has been held to be so liable when goods have been delivered by a consignor and accepted by the company though no receipt has been obtained by the consignor¹. A bailee cannot be held to have committed a default within the meaning of the section if he is prevented from fulfilling that obligation not by any mistake or negligence on his part but by some circumstance entirely beyond human control, *e.g.*, a breach in the railway line. On the other hand, if the bailee, unable to fulfil his obligation (*re* carriage of goods) by some circumstance entirely beyond human control, adopts some other course necessarily attended with risk, which is not contemplated in the contract between him and the bailor, without the latter's knowledge and consent, he does so at his own risk. Such an act amounts to varying an important condition of the contract between the parties without the knowledge of the bailor and, therefore, constitutes a breach of the contract².

14 *Ram v. Govt. of U. P.*, 1950 A 206.

15 *Ray v. G. General*, 1949 C 591.

16 *Genn v. Winkell*, 107 LT 434 : (1911-13) All ER Rep 910.

17 *Crossfield v. Such*, 22 LJ Ex. 325 : 155 ER 1587 : 8 Exch 825.

18 *Shaw & Co. v. Symmons*, (1917) 1 KB 799 : (1916-17) All ER Rep 1093 ; *Davis v Garrett*, 6 Bing. 716, 724 : (1824-34) All ER Rep 286.

19 *Ghutar v. E. I. Ry.*, 104 IC 147.

20 *E. I. Ry. v. Firm Inderman*, 20 ALJ 114.

1 *Sehanpal v. E. I. Ry.*, 20 ALJ 31.

2 *Kishan v. B. B. C. I. Ry.*, 1938 ALJ 855.

When a carrier receives goods under a contract of carriage he cannot shake off his statutory liability under the section by pleading pressure of work or avoidable accident. The law as to the measure of damages is thus summarised in addition on *Contracts*³. "Generally speaking, when a carrier fails to deliver articles of merchandise in the ordinary course, and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold if they had been carried according to the contract and their market value at the earliest period at which they could have been brought to the market after the delivery to the consignee, will be the measure of damages recoverable." A bailee, e.g., a carrier by sea or land, who incurs expenditure for the safety of the goods entrusted to his care, of which delivery is not taken in time, can maintain a claim for reimbursement against the bailor⁴.

The quantum of damages may be big or small, but it does not make any difference to the principle. The principle of assessing the damages is the same, and that is that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages⁵.

162. Termination of gratuitous bailment by death.—A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

The section.—According to S. 153 the liability of the bailee, whether the bailment is gratuitous or for consideration, arises if he does any act with regard to the goods bailed which causes loss to the bailor. This liability does not fall within the principle of the maxim, *actio personalis*, but on the death of the bailee his estate is liable for the loss. It cannot be inferred from this section that liability for a wrong caused by the bailee in respect of the goods bailed, thereby causing loss to the bailor, also comes to an end with the death of the bailee, where the bailment is gratuitous⁶.

163. Bailor entitled to increase or profit from goods bailed.—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of B to be taken care of. The cow has a calf, B is bound to deliver the calf as well as the cow to A.

³ 11 Ed. 1072, cited in *Arjundas v. Secretary of State*, 85 IC 786.

⁴ *G. N. Ry. Co. v. Swaffield*, LR 9 Ex. 132 : (1874-80) All ER Rep 1065.

⁵ *Dhian Singh v. Union of India*, AIR 1958 SC 274, 287, 288.

⁶ *Municipal Board, Lucknow v. Abdul*, 5 Luck 220 ; see *Jwaladutt v. Banadip*, 111 IC 707 PC.

The section.—Where a shareholder had pledged his share, then the company allotted a new share for each share pledged, the Privy Council held that the new shares were clearly an accession to the shares expressly hypothecated, the pledgor or his representative was entitled to recover the same⁷. A pawnee of railway stock, on repayment of the loan, is bound to return it; if he sells it he becomes accountable to the debtor⁸.

164. Bailor's responsibility to bailee.—The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions respecting them.

The section.—"The duties and liabilities of the bailee having been set forth in the preceding sections, this and the three following sections provide for his security"⁹.

165. Bailment by several joint owners.—If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by several joint owners.—In an English case it has been laid down that if a thing be deposited by one, with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other¹⁰. In case of delivery to a bailee by several joint owners, even if there be a contract not to re-deliver without the joint order of all, one of the owners on securing delivery from the bailee cannot sue him by joining the other co-owners; but where he occupies the position of a trustee the bailee is liable for breach of trust in delivering the joint property to one only of the *cestui que trusts*¹¹. The special rule enacted by the section has not the force of a general principle of the law of contract¹².

166. Bailee not responsible on re-delivery to bailor without title.—If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

⁷ *Motilal v Bai Mani*, 52 IA 137.

⁸ *Langton v. Waite*, LR 6 Eq 165.

⁹ C&S 443-4.

¹⁰ *May v. Harvey*, 13 East 197

¹¹ *Brandon v. Scott*, 7 E & B 234.

¹² *Ramaswamy v Munlandy*, 5 IC 343.

Re-delivery to bailor without title.—When a bailee parts with goods deposited with him to, or to the order of, the bailor, he is not liable to the owner of the goods even though the bailor had no authority to deposit the goods with the bailee¹³. According to English law also a bailee is bound to deliver goods to the order of the bailor. As between a bailee and his bailor, under an ordinary contract of bailment, the bailee must, if he desire to defend an action for non-delivery of the goods upon the demand of the bailor, show that he has already delivered them upon a delivery-order authorised by the bailor, or ask for an interpleader order, or defend the action on behalf of a third party on an allegation that he is entitled to the goods, which allegation he must prove¹⁴.

As a general rule, a bailee of goods cannot dispute the title of his bailor¹⁵ except when evicted by title paramount. But the rule does not apply to a hire-purchase agreement which partly gives an option of sale and partly creates a bailment. A hire-purchase agreement is not an ordinary contract of bailment¹⁶. There are no doubt cases in which goods have been taken from a bailee by a third party, who claimed them by title paramount, and if there has been no fault on the part of the bailee, it has been held that this is a good excuse to him as against his bailor. But when a bailee, knowing of two adverse claims to goods, elects to take the part of one of the claimants he is estopped from afterwards denying that claimant's title¹⁷. An auctioneer, as bailee, may set up the right of the true owner against a claim by his employer and will be liable to the true owner for the value of the goods sold as also for goods not sold but removed by the employer¹⁸.

A bailee is no doubt estopped from setting up, as against the bailor's demand, the right or title of a third party, but the estoppel ceases when there is an eviction by title paramount¹⁹. Where a bailor mortgages the chattel bailed, and the mortgagee has a right to demand possession from the bailee, the latter may refuse to deliver the chattel to the bailor, for he has hindered the performance of the contract by the bailee by subjecting him (bailee) to an action at the suit of the mortgagee if he were to deliver to the bailor²⁰.

The law with regard to common carriers is that they are bound to receive the goods for carriage; they can make no enquiry as to ownership. They are protected if they deliver the goods entrusted to them for carriage in pursuance of their employment without notice of the real owner's claim. The law ought equally to protect them against the pseudo-owner, from whom they cannot refuse to receive the goods, in the event of the real owner claiming the goods

13 *Bank of Bombay v Nandlal*, 40 IA 1.

14 *Rogers Son v. Lambert & Co.*, (1891) 1 QB 318, *Biddle v. Bond*, (1861-73) All ER Rep 477 : 6 B&S 225 relied on.

15 See Evidence Act, S 117.

16 *Karflex v. Poole*, (1933) 1 KB 251 : (1933) All ER Rep 46.

17 *Re Sadler*, 19 Ch D 86.

18 *Davis v. Artingstall*, 49 LJ Ch 609.

19 *Leese v. Martin*, LR 17 Eq 224, 233 ; (1861-73) All ER Rep 912 ; *Karflex v. Poole*, (1933) 1 KB 251 : (1933) All ER Rep 46

20 *E. & A. Royal Mail Co., v. R. M. S. P. Co.*, 30 LJCP 247.

and their being given up to him¹. The contract is complete as soon as goods are delivered to the railway company and accepted by them². Where warehousemen, or people engaged in similar business, admit that they hold certain goods to the order of a particular person, they are estopped from denying that man's title and from setting up a title in a third person³. The owner of a chattel let out on a hire purchase system, on retaking possession of the goods as provided for in the agreement, does not lose the right to sue for the arrears of rent⁴.

167. Right of third person claiming goods bailed.—If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

The section.—"As soon as there are several rival claimants to the (goods) copper, the defendants (bailees) should have instituted interpleader proceedings against the rival claimants"⁵. Where a hostile claim is made to goods in the custody of a bailee it is his plain duty to see that the bailor's property is properly defended, or at any rate, to communicate to the bailor that legal proceedings have been instituted for the recovery of the goods by another person. The bailee cannot rely simply on a magistrate's order as protection for delivery of the goods, unless he really acted under compulsion of the order⁶. A bailee can never be in a better position than the bailor. If the bailor has no title, the bailee can have none. When a title to goods bailed is put forward by a stranger it is the duty of the bailee to interplead, if he fails to do so he is liable for wrongful detention⁷.

168. Right of finder of goods ; may sue for specific reward offered.—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner ; but he may retain the goods against the owner until he receives such compensation ; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

169. When finder of thing commonly on sale may sell it.—When a thing which is commonly the subject of sale is lost, if the owner cannot, with reasonable diligence, be found, or if he refuses,

¹ *Sheridan v. New Quay*, 4 CBNS 618, 649 ; see *Eagleton v. B. I. Ry.*, 8 BLR 581, 606.

² *Chhoga v. S. of S.*, 1933 N 261.

³ *Henderson v. Williams*, (1895) 1 QB 521, 533.

⁴ *Brooks v. Beirnsstein*, (1909) 1 KB 98 ; *Modern F. Ltd. v. Om*, 1939 L 324.

⁵ *Rogers v. Lambert & Co.*, (1891) 1 QB 318, 327 ; see S 88 CPC.

⁶ *Ransom v. Platt*, (1911) 2 KB 291.

⁷ *Wilson v. Anderson*, 1 B & Ad 456 : (1824-34) All ER Rep 336.

upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or

(2) when the lawful charges of the finder in respect of the thing found amount to two-thirds of its value.

170. Bailee's particular lien.—Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the service he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

Bailee's particular lien.—The general rule is that in the absence of any special agreement whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it. The case of agistment does not fall within that principle inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own or indirectly by means of any instrument in his possession⁸, but where a bailee has spent labour and skill, e.g., an artificer to whom goods are delivered for the purpose of being worked up into form, or a farrier by whose skill an animal is cured of a disease, or a horse-breaker by whose skill the animal is rendered manageable, in the improvement of a chattel delivered to him, he has a lien for his charge in that respect⁹. But if a workman merely maintains a thing in its former condition, he does not get a lien for the sum spent upon its maintenance. Moreover, it is essential to a lien that the party claiming it should have had the right of continuing possession¹⁰.

This section creates a particular lien in favour of a bailee over goods on which he is entitled to remuneration. But a bailee has no lien where the

⁸ *Jackson v. Cummins*, 5 M & W 342, 349; an agister is in the position of a bailee. He is liable for damage done by the cattle, the owner is not, *Ma Myaing v. Shwe*, 42 IC 52; *Milligan v. Wedge*, 10 LJQB 19.

⁹ *Scarfe v. Morgan*, 4 M & W 270, 283: (1835-42) All ER Rep 43; *Parekh v. Mackenzie*, 1934 O 380.

¹⁰ *Forth v. Simpson*, 13 QB 680; *Hatton v. Car Maintenance Co.*, (1915) 1 Ch 621; (1911-13) All ER Rep 890.

service has not been rendered by him within the stipulated or a reasonable time, nor for remuneration where the service has not been done in a proper way. Forcible removal of the goods from the bailee after expiry of stipulated or reasonable time and on non-completion of the work does not constitute theft¹¹.

Where a person does work under an entire contract with reference to goods delivered at different times in different parcels, such as to establish a lien, he is entitled to a lien on all goods dealt with under that contract¹². Where there is an express contract to do a certain piece of work for a stipulated remuneration, the contract must be performed in its entirety. There is no room for a *quantum meruit* claim where a part only and not the whole of the contract has been performed¹³. The owner may recover the article given without paying for such work as has been done¹⁴.

A claim to a lien may be negated by a special agreement¹⁵. A bailee who, when goods are demanded of him, tests his refusal upon grounds other than the ground of lien, cannot afterwards resort to his lien as justification for retaining them, his refusal operates as a waiver of the lien¹⁶. A bailee cannot create a right of lien in favour of a sub-contractor, as against the owner of the goods, unless the sub-contractor can show either express or implied authority or custom of trade¹⁷. Bailment for mere custody does not confer a lien on the goods bailed¹⁸. By the common law of England, an innkeeper has a lien upon the goods of the guest until he discharges the expenses of his food and lodging¹⁹.

An authority to keep the thing hired in proper order implies an authority to get it repaired if it needs repair. The hirer is entitled to use the hired chattel for all reasonable purposes, and if he undertakes to keep in repair he creates a lien in respect of the proper costs of the repair against the owner²⁰. A bailee entrusted with cattle for grazing has no right of his own accord to sell the cattle for recovery of arrears of his grazing dues¹.

171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of

11 *Judah v. Emperor*, 53 C. 144.

12 *Miller v. Nasmyth's Patent*, 8 C 312; *Chase v. Westmore*, 5 M&S 180 : (1814-23) All ER Rep 730, fold.

13 *Skinner v. Jager*, 6 A 139.

14 *Judah v. Emperor*, 90 IC 289.

15 *Bock v. Gorrisenn*, 2 DGF&J, 434.

16 *White v. Gainer*, 2 Bing 23.

17 *Perington v. Reliance Motor Works*, (1923) 1 KB 127.

18 *Judson v. Etheridge*, 1 Cr & M 743 : (1824-34) All ER Rep 374.

19 *Gordon v. Silber*, 25, QBD 491 : (1886-90) All ER Rep 986

20 *Keene v. Thomas*, (1905) 1 KB 136 : (1904-07) All ER Rep 590.

1 *Vithoba v. Maroti*, 1940 N 270.

account, any goods bailed to them ; but no other persons have a right to retain as a security for such balance goods bailed to them unless there is an express contract to that effect.

1. **A lien.**—A lien is a right in one man to retain that which is in his possession, but belongs to another, till certain demands of the person in possession are satisfied². A lien can only arise in one of three ways, (i) by common law ; (ii) by express or implied contract ; and (iii) by the general course of dealing in the trade in which the lien is claimed. Liens are of two kinds : general and particular. A general lien is the right to retain the property for a general balance of accounts. A particular lien is a right to retain property for a charge on account of labour employed or expenses bestowed upon the identical property detained. Whilst particular liens are favoured, general liens are regarded with jealousy by the law. The right of general lien does not exist by the common law. It must arise out of general usage or by agreement. The onus of proving it lies upon him who claims it. The section limits the right to a general lien, i.e., the right of parties to retain all goods in their possession as a security for a general balance of account to bankers, *etc.*, and the section further declares that no other person has such a right unless there is a special contract³. A claim to a lien may be negatived by a special agreement. A general lien cannot be claimed according to any general law of principal and agent. It can only be claimed as arising from dealing in a particular trade or line of business, such as wharfingers, factors and bankers, in which the custom of a general lien has been judicially proved and acknowledged, or upon express evidence being given that according to the established custom in a particular trade or line of business, a general lien is claimed and allowed⁴. A lien is not the result of an express contract, it is given by an application of law. If, therefore, a mercantile relation which might involve a lien is created by a written contract and security is given for the result of the dealings in that relation, the express stipulation and agreement of the parties for securities exclude lien and limit their rights by the extent of the express contract that they have made⁵. There is no limitation to a claim of lien by way of defence⁶.

2. **Contract to the contrary.**—The general lien of a banker on all securities deposited by a customer does not extend to those deposited in respect of specific sums and not a general account. The general lien, therefore, may be excluded by contract, express or implied⁷. When a document, which is wholly or partly foundation of a suit, is delivered to an Advocate engaged for filing the suit and prosecuting it, the necessary inference is that the Advocate

2 *Hammonds v. Barclay*, 2 East 227, 235.

3 *Re Bombay Saw Mills*, 13 B 314.

4 *Bock v. Gorrissen*, 2 DGF&J 434 ; as to when a mercantile usage may be adopted, see *Produce Brokers Co. v. Olympia Oil Co.*, (1916) 2 KB 296 : (1914-15) All ER Rep 133.

5 *Chambers v. Davidson*, LR 1 PC 296.

6 *Devendra v. Gulab*, 1946 N 114.

7 *London Chartered Bank v. White*, 4 AC 413.

is to file the document along with the plaint or at the first hearing of the suit. Hence exercise of the right of lien over the document, as conferred by sec. 171, will be excluded by an implied contract to the contrary with the result that the Advocate has no right to retain it for the balance of his fees⁸. Whatever the number of accounts that are kept in the books of the banks, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account and not subject to a general lien⁹. Thus, where plaintiff deposited certain jewels with a bank to secure certain debts, on the repayment of the secured debts the plaintiff was held not entitled to recover the jewels unless he proved that the bank had agreed to give up its general lien. Bankers have a general lien on things bailed with them unless there is a contract to the contrary. It is for the plaintiff to prove the existence of the special contract¹⁰. Where a security is deposited with a bank to secure an overdraft, not exceeding a specified amount, the security cannot be applied, because of the express terms of the agreement, to cover advances beyond the amount specified. The claim being under a special contract, the banker cannot exercise his general lien¹¹. Where a customer deposited with his bankers a deed of conveyance, including two distinct properties, giving to them at the same time a memorandum charging one of the properties only as security for a specific sum advanced and also for his general balance of account, inasmuch as the deposit of the deed of conveyance was for the special purpose of giving a security upon one property only, the bankers could claim no general lien on the other property¹². Bankers have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract or circumstances that show an implied contract inconsistent with such a lien. A banker's general lien does not arise on securities deposited with him for a special purpose, e.g., where exchequer bills are placed in his hands to get interest on them or to get them exchanged for new bills¹³, or where money is paid to a bank for remittance abroad, there being an express contract that it will be paid on demand, there is in such a case implied contract inconsistent with the banker's general lien¹⁴.

3. **Bankers.**—The general lien of bankers, as judicially recognised and dealt with in this section, attaches to all goods and securities deposited with them as bankers by a customer or by a third person on a customer's account, provided there is no contract, express or implied, inconsistent with such lien¹⁵. The general lien of bankers is part of the law merchant and is to be judicially noticed like the negotiability of bills of exchange. When a general usage

⁸ *Lalchand v. Pyare Dasrath*, AIR 1971 MP 245.

⁹ *Re European Bank*, LR 8 Ch 41; *Devendra v. Gulab*, 1946 N 114.

¹⁰ *Kunhan v. Bank of Madras*, 19 M 234; *Official Assignee, Madras v. Ramaswamy*, 43 M 747; see discussion of law in Lower Court.

¹¹ *Re Bames*, 33 Ch D 586; (1886-90) All ER Rep 693; *Waistenholm v Sheffield Banking Co.*, 34 LT 746.

¹² *Wylde v. Redford*, 33 LJ Ch 51.

¹³ *Brandao v. Barnett*, 12 Cl. & F. 787; (1843-60) All ER Rep 719.

¹⁴ *Mercantile Bank v. Rochaldas*, 95 IC 358.

¹⁵ *Mercantile Bank v. Rochaldas*, 95 IC 358. See notes above.

has been judicially ascertained and established it becomes part of the law merchant which courts of justice are bound to know and recognise¹⁶. Bankers cannot claim a general lien except upon the customer's own property. This lien does not extend to securities not belonging to the customers and known to the bankers to be deposited for a special purpose. Overdrawing an account is taking a loan and no lien attaches for such a transaction to a security not belonging to the customer and deposited for another purpose¹⁷. But it has been observed that a lien of a banker exists if he has acted with good faith, although the subject of the lien should turn out to be the property of a stranger, e.g., property deposited by a person in reality an agent but not informing the banker of his true character¹⁸. A banker has no lien on documents of title left in his shop after he has refused to advance money on them as a security¹⁹. Unless deposited for a particular purpose all moneys paid into a bank are subject to the banker's lien, and all documents as well as moneys deposited with a banker may be subject, on the banker's part, to a lien in respect of any balance that may be due to him from his customer²⁰. A bank cannot exercise a lien over security deposited by a customer after it has come to know that it is the property not of the customer but of a stranger¹, or after it has come to know that the securities have been assigned over by the customer to another². The general lien of bankers does not extend to boxes or articles deposited with them for safe custody only and not deposited as security for the repayment of advances made by the bank, even where for such advances specific securities were lodged³.

4. **Factors.**—The word 'factor' means an agent entrusted with the possession of goods for the purpose of selling the goods. A factor is entitled, in the absence of a contract to the contrary, to retain as security for a general balance of account any goods bailed to him, he commits no offence by refusing to part with the security until his account has been paid⁴. A factor is an agent, the parties to be considered as principals are the seller and buyer. If the vendee does not pay the factor, the seller can sue the buyer⁵. A factor does not lose his character of factor or his lien because of restrictions imposed by the principal as to the price of sale or to the effect that the sale should take place in the principal's name. A factor is an agent but an agent of a particular kind. He is an agent entrusted with the possession of goods for the purpose of sale⁶. A factor acquires a lien on goods that come into his

16 *Brandao v. Barnett*, 12 Cl & F 787 : (1843-60) All ER Rep 719

17 *Cuthbert v. Robarts*, (1909) 2 Ch 226 : (1908-10) All ER Rep 163

18 *Brandao v. Barnett*, 12 Cl & F 787 : (1843-60) All ER Rep 719.

19 *Lucas v. Dorrien*, 7 Taunt 278.

20 *Misa v. Currie*, IAC 554, 569 : (1874-80) All ER Rep 686 ; *Union Bank v. Aynsley*, 1898 AC 693 ; *re*fd. to in *Mercantile Bank v. Rochaldas*, 95 IC 358,

1 *Locke v. Prescott*, 32 Beav. 261.

2 *London & County Bank v. Ratcliffe*, 6 AC 722 : (1881-85) All ER Rep 486.

3 *Leese v. Martin*, LR 17 Eq 224 : (1861-73) All ER Rep 912.

4 *Parakh v. Emperor*, 92 IC 744 ; see *Stevens v. Biller*, 25 Ch D 31, 37, for a similar definition.

5 *Hornby v. Lacy*, 6 M & S 166.

6 *Stevens v. Biller*, 25 Ch D 31.

possession, whether actual or constructive⁷, but he can only claim a lien for his general balance upon goods which come to his hands as factor⁸. A factor is a person to whom goods are sent or consigned for sale by a merchant residing abroad. He has not only possession, but in consequence of the fact that it is usual to advance money upon them, he has also a special property in them and a general lien upon them. A factor usually sells in his own name without disclosing that of his principal⁹. A factor to whom goods have been delivered for sale has no right to sell those goods against the orders of the owner in order to repay himself the amounts he may have advanced upon them, whether the advance be made at the time the goods are handed to him or subsequently, unless it be proved that an agreement to that effect was made at the time of the advance or may be inferred from the course of business between the parties¹⁰. A factor cannot set up a general lien in opposition to the positive directions of his principal. Where a consignor draws certain bills against the consignment, if a consignee thinks proper to accept the consignment with the express direction to apply the proceeds in the payment of the bill, he cannot set up his general lien in opposition to those directions¹¹.

5. **Wharfingers.**—A wharfinger has a lien against the owner of the goods. He has no lien against the buyer for charges incurred after the sale has been notified to him¹². Persons having a wharf as an accessory to a screwhouse are not wharfingers¹³.

6. **Attorneys.**—A solicitor has a lien for all taxable costs, charges and expenses, which include payments made to counsel and incurred by him as solicitor for his client; but he has no lien for ordinary loans. Whether a lien is waived or not by taking a security depends upon the intention expressed or is to be inferred from the position of the parties and all the circumstances of the case¹⁴. The solicitor has a lien for his costs upon the papers in his hands and can retain them till he is satisfied¹⁵. The lien cannot extend to what is the solicitor's own property, e.g. a mortgage deed prepared by him for his client, the mortgagor¹⁶, but is confined to the property of his client¹⁷. The things on which the lien exists are things on which the attorney has expended his own labour and his own money¹⁸.

If a solicitor chooses to discharge himself, he cannot set up a lien as a reason for not delivering up the papers of his client to enable him to proceed

7 *Bryans v. Nix*, 4 M & W 775.

8 *Dixon v. Stansfeld*, 10 CB 398.

9 *Baring v. Corrie*, 2 B & Ald 137 · (1814-23) All ER Rep 283.

10 *Jafferbhoy v. Charlesworth*, 17 B 520, 545.

11 *Frith v. Forbes*, 4 D G F & J 409, 420

12 *Barry v. Longmore*, 12 Ad & E 639.

13 *Miller v. Nasmyth's Patent Press*, 8 C 312

14 *Re Taylor*, (1891) 1 Ch 590 fold, on the question of waiver in *Re Douglas Norman & Co.*, (1898) 1 Ch 199.

15 *Bai Kesserbai v. Narayanji*, 4 B 353.

16 *Sheffield v. Eden*, 10 Ch D 291.

17 *General Share Trust Co. v. Chapman*, 1 CPD 771

18 *Bai Kesserbai v. Narayanji*, 4 B 353.

in a pending litigation. But if the solicitor has been discharged by his client he may set up such a lien; he may by non-production of papers embarrass the client in order to force him to pay what is due to him. His right of lien extends to all that is due to him, and not only to the amount due in respect of the particular matters to which the papers sought to be produced relate¹⁹. Where a solicitor discharges himself the court will order him to deliver up the papers in the cause to the new solicitor upon his saving his lien thereon²⁰. The lien of a solicitor largely depends therefore upon the circumstances under which he has ceased to act for his client. The test is whether or not the solicitor has discharged himself or whether he has been discharged by the client; in other words, the question is whether the solicitor has ceased to act for his client owing to any unjustifiable action of his own or whether he has so ceased owing to the action of the client¹. This distinction has been followed in numerous decisions². "I hold it to be settled by the authorities that if a firm of solicitors becomes bankrupt, the bankruptcy is itself a discharge of the clients who employ them; but I also hold this, which I think is equally clear, that if the client becomes bankrupt and the assignees do not employ the firm of solicitors, that is a discharge by the client of the solicitors"³.

Where a firm of attorneys dissolves partnership after the death of a client, there being at the time papers and documents belonging to the clients in their hands, and a debt due in respect of costs from the client to them, the dissolution operates as a discharge by the firm; the attorneys are not entitled to retain the papers and documents until their costs are paid but are bound to hand them over to the administrator of the client⁴. There is no rule which prevents an attorney from taking security or otherwise arranging with his client for the payment of costs which have actually become due, or from agreeing for any fair amount of interest in making such an arrangement⁵. Summary enforcement of attorneys' costs without a regular suit, simply by an order obtained in chambers for payment of the sum allowed on taxation, can be employed against the representative of a deceased client⁶. A decree-holder cannot set off his claim against the costs payable by him to the debtor's solicitor so as to defeat the latter's lien⁷. The lien of a solicitor does not attach to real property, but with that exception it applies to property of every description including costs ordered to be paid to the client. A mortgagee's claim for advances made to pay off prior encumbrances has priority over the solicitor's lien⁸. Under the English law the solicitor has a lien upon real property

19 *Re Faithfully*, L. R. 6 Eq. 325; *Anglo-Indian Drug Co. v. Sugandha*, 62 C 464.

20 *Wilson v. Emmett*, 19 Beav. 233.

1 *Ayeshabai v. Ahmed*, 13 Bom LR 670; *Atul v. Soshi*, 29 C 63.

2 *Bai Kessarbai v. Narayanji*, 4 B 353; *Basanta v. Kusum*, 4 CWN 767; *Narayandas v. Narayandas*, 34 Bom LR 703, 705.

3 *Re Moss*, LR 2 Eq 345.

4 *Re McCorkindale*, 6 C 1.

5 *Monohur v. Romanath*, 3 C 473, 481.

6 *Assur v. Ruttonbai*, 16 B 152.

7 *Re Ebrahim*, 55 B 377.

8 *Sudanand v. Parashram*, 52 B 336.

recovered by his exertions for a client⁹, but an advocate has no such lien except under an express agreement with the client to that effect¹⁰. The possessory lien of a solicitor corresponds to S. 171. The solicitor's lien in the various High Courts is governed exclusively by the law as it existed in England before the passing of the Solicitors Act (23 & 24 Vict. c. 127). He has a lien for his costs over property recovered, or preserved, or over the proceeds of any property obtained by his exertions for his client¹¹. A solicitor has no higher right than his own client and his lien is subject to all equities between the client and other parties interested in the property¹². His lien has priority over any attachment by a judgment creditor so long as the moneys attached remain within the jurisdiction of the court, i.e., are not realised and paid off to the judgment creditor¹³. A solicitor's charge on property recovered is the first charge¹⁴. There cannot be a personal decree against an infant but the attorney is entitled to have a charge declared on the infant's properties¹⁵. A solicitor will not be allowed to assert his lien for costs in such a way as to embarrass the proceedings in a suit, but must hand over the papers to the new solicitor without prejudice to his lien¹⁶. Where a firm of solicitors was compelled to produce certain documents, in spite of their objections, on the ground that they had a lien upon them for unpaid costs, the High Court refused to interfere under Cl. 15 of the Charter¹⁷. The court never interferes for the purpose of preserving the solicitor's lien after a *bona fide* compromise between the parties has been arrived at¹⁸. It is not open to an attorney to say that his client shall continue to employ him in the proceeding until all costs due to him are paid¹⁹. Where there are assets of a partnership in the hands of a receiver appointed in partnership suit, the solicitor engaged in that suit is entitled to ask for a charge on those assets in priority to the creditors of the partnership²⁰. The mere fact that the appointment of a receiver in an administration suit would preserve the fund from possible danger in the future does not entitle the solicitor to claim a lien upon such fund¹. A solicitor's lien does not prevail over the set off for damages or costs claimed by the parties². The common law lien of a solicitor remains unaffected by the insolvency of the client³. An attorney having discharged his client cannot change sides. The court will restrain him by injunction from doing so⁴. When there is a change of attorney during the pendency of a suit, the second

9 See *Kumar v. Hari*, 20 CWN 537.

10 *Krishnama v. Official Assignee*, 55 M 455.

11 *Tyabji Dayabhai & Co. v. Jetha*, 51 B 855.

12 *Bhupendra v. Sasson*, 21 CWN 106.

13 *Ved & Soper v. Wagle*, 49 B 505.

14 *Ispahani v. Chandi*, 9 CWN cxcvii.

15 *Kumar v. Hari*, 20 CWN 537.

16 *Re Boughton*, 23 Ch D 169.

17 *Swinhoe v. Hera Lal*, 2 CWN 727.

18 *Jhaverchand v. Achaldas*, 34 Bom LR 721, 725.

19 *Dharamdas v. Kachudas*, 35 Bom LR 298.

20 *Ismail & Co. v. Rabiabai*, 34 B 484; *Ridd v. Thorne*, (1902) 2 Ch D 344.

1 *Devkabai v. Jefferson*, 10 B 248.

2 *Vallabhdas v. Pranshankar*, 34 Bom LR 1429.

3 *Ganesh v. Narayani*, (1939) 1 C 212.

4 *Ramlal v. Moonia*, 6 C 79.

attorney, knowing that the first attorney has been unpaid, when he realises the costs, does so on behalf of the first attorney also to the extent of his share⁵. The conduct of an attorney, in refusing to act for clients unless they put him in funds to pay the fees of the briefs to counsel, is a discharge of the clients by the attorney. It is immaterial that the clients have undertaken to put him in funds⁶. The nature of a solicitor's lien has been set out in *Damodar v. Morgan*⁷.

7. No other persons.—There is no rule of law giving a lien to a banian, neither is there any custom to that effect. If he claims one he must prove it either by showing some express agreement or some course of dealing from which it may be implied⁸. A stock-broker, like a factor or commission agent, has a general lien on documents which come to his hands in the course of his business lawfully in his custody, and can retain them for the balance due on his general account, and not arising out of the transaction in respect of which the deposit was made⁹. Secretaries and treasurers of a company who have made advances and incurred expenses on behalf of the company from time to time in the conduct of its business are not factors and, therefore, cannot exercise a lien on the property of the company in their hands¹⁰. The rights of a creditor who accommodates his customer, by storing goods for the purpose of which he has advanced money, are higher than those of an ordinary bailee who has a general lien under this section, in so far as in the former case there is an implication that the securities shall, if necessary, be made effectual to discharge the obligation. The possession of the creditor is in fact that of a pledgee and he has the power of sale¹¹.

Bailments of pledges

172. "Pledge," "pawnor" and "pawnee" defined.—The bailment of goods as security for payment of a debt or performance of a promise is called "pledge." The bailor is in this case called the "pawnor." The bailee is called the "pawnee."

1. The section.—There are three classes of securities: the first a simple lien; the second a mortgage passing the property out and out; the third a security intermediate between a lien and a mortgage, viz., a pledge, where by a contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt¹². A

⁵ *Orr v. Norendra*, 19 C 368.

⁶ *Moheshpur Coal Co. v. Jatindra*, 40 C 386.

⁷ 60 C 1442; see *Narayandas v. Narayandas*, 34 Bom LR 703; *Prabhu v. Kumar*, 20 CWN 437.

⁸ *Peacock v. Baijnath*, 18 C 573, 597.

⁹ *Hope & Co. v. Glendinning*, 1911 AC 419, 421, 431.

¹⁰ *Re Bombay Saw Mills*, 13 B 314.

¹¹ *Mercantile Bank v. Shagle & Co.*, 25 IC 376.

¹² *Halliday v. Holgate*, LR 3 Ex 299; *Donald v. Suckling*, LR 1 QB 585, see for defs of 'pawne'.

pledge, in the ordinary sense of the term, is a case in which money is advanced on goods or chattels which are given into the possession of the person who advances money on them. Where the legal property in goods passes to the person who lends money on them, but the possession does not pass, it is hypothecation, the document by which the legal property is given is called a bill of sale¹³. In case of a mortgage of immovables there is the intention to pass the property in the goods mortgaged to the creditor¹⁴. Sections 172 and 178 indicate that 'goods' connote property capable of physical possession and transferable by manual delivery. A pledge is neither a mortgage nor a lien. It passes no title to the goods but only the right to retain possession till payment¹⁵. When a person is in possession of the goods of another, e.g., when he holds them in pledge, it is for him to prove the assertion, the burden does not lie on the owner to prove the deposit¹⁶.

There is no difference between the common law of England and the law with regard to pledge as codified in sections 172 to 176 of the Contract Act. Under s. 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 173 entitles a pawnee to retain the goods pledged as security for payment of a debt and under section 175 he is entitled to receive from the pawnor any extraordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a pawnee and provides that in case of default by the pawnor the pawnee has (i) the right to sue upon the debt and to retain the goods as collateral security, and (ii) to sell the goods after reasonable notice of the intended sale to the pawnor. Once the pawnee by virtue of his right under s. 176 sells the goods the right of the pawnor to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawnor. So long, however, the sale does not take place the pawnor is entitled to redeem the goods on payment of the debt. It follows, therefore, that where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and, therefore, if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree. If it were otherwise, the result would be that he would recover the debt and also retain the goods pledged and the pawnor in such a case would be placed in a position where he incurs a great liability than he bargained for under the contract of pledge. The pawnee, therefore, can sue on the debt retaining the pledged goods as collateral security. If the debt is paid he has to return the goods with or without the assistance of the court and appropriate the sale proceeds towards the debt. But if he sues on the debt denying the pledge, and it is found that he was given possession of the goods pledged and had retained the same, the

¹³ *Mills v. Charlesworth*, 25 QBD 421, 424.

¹⁴ *Jagannath v. Pate*, 1949 N 368.

¹⁵ *Rylands v. Kennamora*, 1941 M 394.

¹⁶ *Ramakrishandas v. Jasumal*, 61 IC 305.

pawnor has the right to redeem the goods so pledged by payment of the debt. If the pawnee is not in a position to redeliver the goods he cannot have both the payment of the debt and also the goods. Where the value of the pledged property is less than the debt and in a suit for recovery of debt by the pledgee, the pledgee denies the pledge or is otherwise not in a position to return the pledged goods he has to give credit for the value of the goods and would be entitled then to recover only the balance¹⁷.

2. **Lien and pledge.**—S. 171 refers to the lien of bankers, etc., to retain as security for a general balance of account any goods bailed to them. In other words, if a certain sum is due to a bank in one account, it may, under certain circumstances, make available other moneys or movables that come into its hands in another account and thus reimburse itself in the former account. Where, however, goods have been bailed with a bank as collateral security for repayment of the moneys that had been advanced for purchasing these very goods, the case is clearly one of pledge, and consequently under S. 176 the bank has the power, if default is made in payment on demand, to sell the goods, on giving the owner reasonable notice of the sale. A general lien confers on the lien-holder the right to retain the goods until payment and does not carry with it the right of sale to secure the debt or indemnity; but the right of a pledge under S. 172 conveys with it the implication that the security shall, if necessary, be made effectual to discharge the obligation. In one case a mere right of detention or retainer is given, in the other, a special property in the chattel bailed is created in favour of the pledgee¹⁸. A pawnee by repledging the goods pawned does not avoid the contract upon which they were deposited with him so as to vest in the pawnor an immediate right to the possession thereof¹⁹, but such a right would accrue to the pawnor when the bailment is determined by a tortious act of the pawnee²⁰.

3. **Delivery essential to pledge.**—A deposit by way of a pledge involves a transfer of possession, it cannot be effected by a licence to take possession¹. "A mere pledge cannot be given without the delivery of the possession of the goods"², actual or symbolical³; "in order to complete the pledge it is not necessary that there should be an actual delivery of the chattel to the pledgee; it is sufficient if there be a constructive delivery. It is not necessary that subject of the pledge should have actually passed from the hands of the pledgor to those of the pledgee. The property in the goods may pass even though they remain in the possession of the pledgor; provided they do so by virtue of a contract between the parties which makes the custody of the pledgor the custody of the pledgee... . So in many cases a symbolical delivery is held

17 *Lallan Prasad v. Rahmat Ali*, AIR 1967 SC 1322, 1325, 1326.

18 *Alliance Bank v. Ghamandi*, 8 Lah 373; see *Donald v. Suckling*, LR 1 QB 585, 604.

19 *Donald v. Suckling*, LR 1 QB 585.

20 *Katta v. Kamalammal*, 42 MLJ 32.

1 *Ex. p. Parsons*, 16 QBD 532; *Jyoti v. Mukti*, 22 CWN 297; *Re Townsend*, 16 QBD 532.

2 *Ayers v. S. A. Banking Co.*, LR 3 PC 548, 554.

3 *C. H. Bank v. Surendra*, 1932 C 524.

to be sufficient, a symbolical delivery being equivalent to such a constructive delivery as will complete a pledge"⁴. It is essential, therefore, to a contract of pawn that the property pledged should be actually or constructively delivered to the pawnee⁵. A special property in the goods pledged passes to the pledgee, so that he may deal with them, if necessary, to enforce his rights; the general property in the goods pledged remains in the pledgor. It is not necessary that the delivery of possession should be contemporaneous with the advance. The possession may be delivered within a reasonable time⁶. It follows, therefore, that an intention to create a charge is not the same thing as effecting a pledge. A pawn is not an equitable mortgage. It is a security intermediate between a simple loan and a mortgage which wholly passes property in the thing pawned⁷. It is difficult to apply the law relating to pawns to all classes of documents, e.g., to title-deeds or government securities which require endorsement. Pledges to a bank of government securities⁸ are made by endorsement and delivery⁹. A pledgee who parts with his goods under a fraud practised upon him by the pledgor may recover possession of the goods from the pledgor but not from a *bona fide* purchaser for value from the pledgor¹⁰. A delivery of goods by a pledgee to a pledgor as his agent does not put an end to the pledge¹¹.

4. **Hypothecation.**—For the hypothecation of the movables which remain in the hands of the borrower no provision has been made in any Indian statute, but it is valid and the rights of the parties are governed by the general law of contract¹². In *Co-operative H. Bank v. Surendra*¹³, it has been laid down that a simple mortgage of movables with a power of sale is a mere hypothecation with the stipulation that in the event of the debt not being paid the mortgaged articles may be sold. Technically speaking, there is no such thing as a pledge without possession. There may be an agreement to pledge, and when in pursuance to that agreement the lender takes possession it becomes a pledge¹⁴. A hire-purchase agreement is a compound of agreement of hiring and agreement to sell, tinged with an agreement of hypothecation. The main point regarding such an agreement is to determine the precise time when property in the subject passes to hirer¹⁵. The distinguishing mark of a true hire-purchase agreement is that the hirer should have the right to terminate the agreement at his pleasure¹⁶.

4 *Meyerstein v. Barber*, LR 2 CP 38, 51; *Narasiah v. Venkataramiah*, 12 M 59.

5 *Jyoti v. Mukti*, 22 CWN 297.

6 *Hilton v. Tucker*, 39 Ch D 669; (1886-90) All ER Rep 440

7 See *Re Richardson*, 30 Ch D 396; *Backhouse v. Charlton*, 8 Ch D 444; *Carter v. Wake*, 4 Ch D 605.

8 *Neikram v. Bank of Bengal*, 19 IA 60.

9 *Jyoti v. Mukti*, 22 CWN 297.

10 *Babcock v. Lawson*, 5 QBD 284.

11 *N. W. Bank v. Poynter*, 1895 AC 56; (1891-94) All ER Rep 754

12 *Nanhuji v. Chinna*, 10 IC 869.

13 59 C 667.

14 *Manmohan v. Kesrichand*, 62 C 1046.

15 *Manick v. B. M. Supply Co.*, 1938 N 18.

16 *Mahabali v. Palmer*, 1932 A 607; *Babu v. Mahesh*, 1934 O 133.

A hire-purchase agreement is distinct from a sale in which the price is to be paid later by instalments. In the case of a sale in which the price is to be paid by instalments, the property passes as soon as the sale is made, even though the price has not been fully paid and may later be paid in instalments. The essence of a sale is that the property is transferred from the seller to the buyer for a price, whether paid at once or paid later in instalments. On the other hand, a hire-purchase agreement, as its very name implies, has two aspects. There is first an aspect of bailment of the goods subjected to the hire-purchase agreement, and there is next an element of sale which fructifies when the option to purchase, which is usually a term of hire-purchase agreements, is exercised by the intending purchaser. Thus, the intending purchaser is known as the hirer so long as the option to purchase is not exercised, and the essence of a hire-purchase agreement properly so called is that the property in the goods does not pass at the time of the agreement but remains in the intending seller, and only passes later when the option is exercised by the intending purchaser. The distinguishing feature of a hire-purchase agreement is that the property does not pass when the agreement is made but only passes when the option is finally exercised after complying with all the terms of the agreement.

A hire-purchase agreement has two elements : (i) element of bailment ; and (ii) element of sale in the sense that it contemplates an eventual sale. The element of sale fructifies when the option is exercised by the intending purchaser after fulfilling the terms of the agreement. When all the terms of the agreement are satisfied and the option is exercised a sale takes place of the goods which till then had been hired.

173. Pawnee's right of retainer.—The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest, the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Pledgee's right of retainer.—A pledgee is bound to deliver up the security on payment of the sum secured with interest and costs. If a chattel be pledged the general property remains in the pledgor. The pledgee has only a special property which is determined if a proper tender is made and refused. The pledgee then becomes a wrongdoer. The pledgor can at once recover the property by action¹⁷.

A distinction is drawn in the section read with S. 175 between expenses which are necessary and those which are extraordinary. For necessary expenses incurred by the pawnee he has the right to retain the goods under this section, i.e., a lien ; for extraordinary expenses he has no lien, but S. 175 confers on him the right to recover the same. This right, however, is available under

¹⁷ *Bank of N. S. Wales v. O'Connor*, 14 AC 273, 282 : (1886-90) All ER Rep 672.

S. 70 for both classes of expenses. Mr. Stokes suggests that the expenses incurred in healing a pledged horse injured by accident may be taken as an illustration of extraordinary expenses. The relation of a banker and a customer is generally that of agent and principal, of debtor and creditor. But a customer depositing securities in a bank as a cover for advances, or for the purpose of securing overdrafts or advances, is a pledgor, the transaction being a pledge. If the bank uses the securities for its own purposes it is liable for conversion¹⁸. This section gives the pledgee only the right to retain the goods and S. 176 the right to sell.

174. Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.—The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged ; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

The section.—The section is not happily drafted. It amounts in effect to this. You must find a contract allowing you to hold articles for subsequent advances as well as the original advance. Then if you know nothing more than this that there was a pledge for a particular sum, and that there was a further payment or a further advance, then you may presume, in the absence of anything to the contrary, that the real contract between the parties was that the pledge should cover this subsequent advance. It would be dangerous to hold that any pledge of articles for a particular sum must be taken to include also a pledge for subsequent advances¹⁹. In other words, the doctrine of tacking does not apply to pledges of movables, and the pledgee has no general lien on goods pledged.

175. Pawnee's right as to extraordinary expenses incurred.—The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. Pawnee's right where pawnor makes default.—If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security ; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

¹⁸ *Bank of Dacca v. Gour*, (1937) 1 Cal 57.

¹⁹ *Chunshi v. Official Assignee, Bombay*, 30 Bom LR 1310, 1312, 1314.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

1. **Rights of the pledgee.**—"Where movable property is pledged to a person for money lent, he acquires a special property therein, and he is entitled under §. 176 either to bring a suit against the owner upon the debt or promise, retaining the goods pledged as collateral security, or he may sell them upon giving reasonable notice of the sale"²⁰. A pledge of personal chattels is and must be accompanied by delivery of possession. It is out of the possession given him under the contract that the pledgee's rights spring. A contract of pledge carries with it the implication that the security may be available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale. Hypothecation of movables may be accompanied with transfer of possession and has the same effect as a pledge and confers similar rights on the mortgagee¹. A pawnee has a right to sell the pledged goods; that right is perfected with the giving of the notice of sale, and it is open to the pawnee to sell at any date thereafter. The power of sale is expressly conferred upon him for his benefit according to his discretion and for the realisation of the debt due to him². The rights of the pawnee cannot be extinguished even by the lawful seizure of the goods pawned by the Government for arrears of excise duty and by making the sale proceeds of the goods seized available to other creditors of the pawnor without fully satisfying the claim of the pawnee. After the seizure, the Government is bound to pay the amount due to the pawnee. The balance alone is available from other creditors. If the Government deprives him of his amount due, the Government is bound to reimburse him³.

The deposit of a certificate, of which endorsement is necessary and title to which therefore does not pass by delivery, by way of security for a debt, amounts to an equitable mortgage and not a pledge. A pledgee is in a different position from an ordinary mortgagee, he has only a special property in the thing pledged. He may obtain a sale but he cannot obtain foreclosure⁴. Share certificates like shares are goods. A valid pledge can be created by delivery of a share certificate⁵. The position of a mortgagee is in some respect better than the position of a pawnee⁶. A mortgage, even by deposit of title deeds,

²⁰ *Jyoti v. Mukti*, 22 CWN 297, referring to *Nim Chand v. Jagabandhu*, 22 C 21; *Mahalinga v. Ganapati*, 27 M 528; see *Jiwan v. Sahu*, 1945 A 299.

¹ Ex. p. *Official Receiver*, 18 QBD 22.

² *Cooverji v. Mawji*, 38 Bom LR 982.

³ *Bank of Bihar v. State of Bihar*, AIR 1971 SC 1210.

⁴ *Harrold v. Plenty*, (1901) 2 Ch 314.

⁵ *Kannambra v. Krishna*, 1943 M 74.

⁶ *Deverges v. Sandeman*, (1902) 1 Ch 579; (1900-03) All ER Rep 648.

carries all the incidents of a legal mortgage. But the pledgee never has the absolute ownership at law and his equitable rights cannot exceed his legal title. A pledgee has not the same right of foreclosure as a mortgagee by deposit of title deeds⁷. A sale by the pawnee to himself, though unauthorised, of the goods pawned does not put an end to the contract of pledge, so as to entitle the pawnor to have back the goods without payment of the loans for which they were security⁸. A pledgee is entitled to sue for the property pledged to him notwithstanding that he will be entitled under the section to sell the property without reference to the court⁹. If the debt is repaid the pawnee must return the goods pawned. When he is not in a position to redeliver the goods he cannot have both the payment of the debt and also the goods. Where in a suit for recovery of debt the pledgee is not in a position to return the goods he has to give credit for the value of the goods and a decree will be passed for the balance¹⁰.

2. **Notice.**—The section requires notice only when the pawnee wishes to exercise his option of selling the pledged goods. If he chooses to bring a suit upon the debt no notice is apparently required by the section¹¹. The section is mandatory. It seems under this section notice of sale must be given by the pawnee whether there has been a stipulated time for payment of the debt or not; but in English law the rule is that if a day is fixed by the contract for the payment of the debt, if the borrower does not repay the advance, the lender is at liberty to reimburse himself by the sale of the things pledged, but when a loan is for an indefinite time the lender may terminate the credit by giving notice to the debtor to pay on a certain day and that upon default in payment on that day the pledgee may sell¹², the reason being that the debtor is not in default until notice is given by the creditor that he requires payment on a certain day and that day is passed¹³. The section does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The words "he may sell, notice of the sale" mean an intention to sell, and they do not necessarily mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor. All that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed¹⁴. (Compare seller's right to resell under S. 107 and the necessity of giving reasonable notice). The pawnee is not bound to give full details about the date and the place of sale. But the notice must refer to the debt for which the goods

7 *Carter v. Wake*, 4 Ch D 605.

8 *Neikram v. Bank of Bengal*, 19 IA 60; *Ramaswamy v. Palaniappa*, 122 IC 37; *Ram v. Sayed*, 1944 P 135.

9 *Mahalinga v. Ganapati*, 13 MLJ 445.

10 *Lallan Prasad v. Rahmat Ali*, AIR 1967 SC 1322.

11 *Jwala v. Pundlik*, 48 IC 970; *Makhan v. Ghulam*, 146 IC 194.

12 *Deverge v. Sandeman*, (1902) 1 Ch 579; (1900-03) All ER Rep 648; *Official Assignee v. Madho*, 1947 B 217; *Moti v. Lakshmi*, 1943 N 162.

13 *Pigot v. Cubley*, 33 LJCP 134, 136 n.; see *Re Richardson*, 30 Ch D 396, 403; *Ex p. Hubbard*, 17 QBD 690, 698; *Ram v. Sayed*, 1944 P 135.

14 *Kunj Behari v. Bhargava C. Bank*, 40 A 522.

stand pledged and for the recovery of which the pledged goods are to be sold also to the amount thereof. If the notice be not sufficient, the sale is not void but unlawful and the pawnee is liable in damages to the pawnor for the loss sustained by him¹⁵. An omission to state the specific amount due does not make the notice invalid if the debtor had means of knowing the amount due¹⁶. The notice must be a reasonable notice with definite particulars as distinguished from a mere intimation that arrangements will be made for a sale. Once a proper notice is given, it is not necessary to give a fresh notice if the contemplated sale is adjourned to a future date¹⁷. Although the pawnee is required to give reasonable notice of the intended sale, he does not require any further authorisation or permission of the pawnor to effect the actual sale. The section does not say that the pawnee who gives notice of sale should sell within a reasonable time thereafter, in fact, he is not bound to sell at any particular time. The things are sold as the property of the pawnor who has a right to redeem the pledge before sale (S. 177). The power of sale is conferred on the pawnee to be exercised for his benefit¹⁸. The question of notice does not arise if the pawnor's consent to the transfer has been obtained before the transfer¹⁹.

3. Limitation.—The claim to proceed against the property pledged is governed by Art. 120 and the claim to proceed against the debtor personally is governed by Art. 57²⁰.

4. Surplus or deficiency on sale.—In a contract of pledge if the article pawned does not realise the amount lent on it, the pledgee may bring an action for the deficit¹, as provided for in the second paragraph. The goods pledged are sold as the property of the pawnor and the latter is entitled to the surplus proceeds of the sale after the debt is fully discharged; and the pawnee has also, until a sale is actually made, the right to redeem the pledge (S. 177). These provisions show that the power of sale is one which is conferred on the pawnee to be exercised for his benefit according to his discretion².

177. Defaulting pawnor's right to redeem.—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in

15 *Cooverji v. Mawji*, 38 Bom LR 982; see *Co-operative H Bank v. Surendra*, 1932 C 524; *Moti v. Lakhmi*, 1943 N 162

16 *Moti v Lakhmi*, 1943 N 162.

17 *Co-operative H. Bank v. Surendra*, 59 C 667, 686

18 *Kesarimal v. Gundabathula*, 114 IC 820.

19 *Madho v. Official Assignee*, 1950 FC 21.

20 *Mahalinga v. Ganapathi*, 27 M 528; *Nirm Chand v Jagabandhu*, 22 C 21, *reld.* to in *Jyoti v. Mukti*, 22 CWN 297; *Saiyid Ali v. Devi Prasad*, 24 A 251; *Debidin v. Gaya Pershad*, 104 IC 641; *Yellappa v Desayappa*, 13 B 218; *Fisher v Ardeshtir*, 1955 B 213.

1 *Jones v Marshall*, 24 QBD 269.

2 *Kesarimal v. Gundabathula*, 114 IC 820.

payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them ; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

The section.—An agreement that a pledge would become irredeemable after a certain time is not *per se* a penalty, unless the value of the article pledged is very much larger than the amount of the loan³.

178. Pledge by mercantile agent.—Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has no authority to pledge.

Explanation.—In this section, the expressions ‘mercantile agent’ and ‘documents of title’ shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

1. Amendment.—S. 178 of the Contract Act, 1872 was repealed by the Indian Contract (Amendment) Act (4 of 1930) and the present Ss. 178 and 178A were substituted in its place. S. 108, which also deals with a similar topic, has been amended and it now forms Ss. 27-30 of the Sale of Goods Act. The Factors Act (XIII of 1840 and XX of 1840) were repealed by the Contract Act. The original S. 178 ran as follows :—

178. Pledge by possessor of goods or of documentary title to goods.—A person who is in possession of any goods or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents :

Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly.

Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.

Of the old sections 108 and 178 it has been said that they “though very possibly extend, at least cover the same ground as the provisions of the Indian Factors Act XX of 1844”⁴.

2. The section.—It would be seen that the old section gave power to any person who happened to be in possession of documents of the specified kind to

³ *Dwarika v. Bhagwati*, 1939 R 413.

⁴ *Ramdas v. Amerchand*. 43 IA 164. 169.

make a valid pledge, but by the present section the power is confined to mercantile agents only. But the operation of the old section was sought to be limited by giving a restricted meaning to the word 'possession' (see below). Three things were required by the old section to make the pledge valid : (i) possession on the part of the pawnor ; (ii) good faith on the part of the pawnee ; and (iii) lawful acquisition on the part of the pawnor⁵. Under the present section a pledgee has to prove (i) that the person in possession of the goods made a pledge of them ; (ii) that the pledgee or pawnee acted in good faith and under circumstances which were not such as to raise a reasonable presumption that the pawnor was acting improperly ; (iii) that the goods were not obtained from the lawful owner, or from any person in lawful custody of them, by means of an offence or fraud ; and (iv) that the pledge was made by a mercantile agent⁶. The section has been enacted in order to protect those persons who in good faith deal with persons whom they know to be mercantile agents, but of the details of whose agreements they are not aware. It can be relied upon only in cases when the pledgee is aware that the pledgor is a mercantile agent⁷. The amendment has not effected any change in the law as to the right of a gratuitous bailee⁸.

3. Documents of title.—The expression has been defined as including any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented [see Sale of Goods Act, S. 2 (4)]. Whenever any doubt arises as to whether a particular document is a "document showing title" or a "document of title" to goods for the purposes of this Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented⁹. A pledge of the documents amounts to a pledge of the goods to which they relate. The pledgee does not release the pledge by a redelivery to the pledgor of the document of title for a limited period or for a particular purpose¹⁰. Share certificates are not documents of title of goods within the meaning of this section¹¹, but railway receipts are documents of title¹². A document of title is a negotiable instrument to the extent that the possessor of it can give a valid title to the

5 *Durgabai v. Sarasvatibai*, 31 Bom. LR 414 ; see *Sokkmal v. Lokanatha*, 66 MLJ 361.

6 *Secretary of State v. Rishi Ram*, 50 A 227 ; *P. S. & Co. v. D. Sreymal*, AIR 1972 MP 40

7 *Ah Cheung v. Wain*, 1938 R 243.

8 *Visalakshi v. Nidhi*, 1942 M 299.

9 *Ramdas v. Amerchand*, 43 IA 164 ; *Mercantile Bank v. Central Bank*, 69 MLJ 509.

10 *Official Assignee v. Mercantile Bank*, 37 Bom. LR 130 PC ; *Mercantile Bank v. Central Bank*, 172 IC 745 PC.

11 *Lalit v. Haridas*, 24 CLJ 335.

12 *Sati v. Kameswara*, 69 MLJ 716 ; *Mercantile Bank v. Central Bank*, 172 IC 745 PC.

goods represented thereby to a vendee or pledgee. A *bona fide* transferee for value may rely on the delivery of a document of title as proof that the person delivering it is entitled to transfer the goods represented by the document. The principle cannot operate in favour of a mere agent in any way. In the absence of any evidence to show a mercantile custom that an unendorsed railway receipt is used in the ordinary course of business as proof of the possession or control of goods, it is not a document of title in the hands of the person to whom it is sent¹³. Shares in joint stock companies must be held included within the meaning of the word 'goods' as used in the section¹⁴. The essential characteristic of a negotiable instrument is that the document is transferable as if it were cash. A *bona fide* transferee for value of the document acquires a good title though his transferor had none. But a document showing title to goods is on a different footing. The document is taken to represent the goods to which it relates and the law governing its transferability is the same as the law which governs the transferability of the goods themselves¹⁵. Documents of title, it has been held, do not include government securities, for the mere delivery of these securities gives no property for the purpose of negotiation or sale without endorsement¹⁶. The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods nor is its possession equivalent to possession of the goods¹⁷. The deposit of a certificate of shares as security without an endorsement or transfer is not a pledge but amounts to an equitable mortgage¹⁸.

4. Mercantile agent.—A mercantile agent means an agent having in the customary course of business, as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to raise money on the security of goods¹⁹. A mercantile agent obtained documents of title for sale of merchandise but pledged the documents. The pledge was valid²⁰. Where a manufacturing jeweller delivered 'on sale or return' certain articles of jewellery to a retail jeweller, the latter was not a prospective buyer but a mercantile agent and he had, therefore, authority to pledge the articles without express authority from the manufacturing jeweller¹. A broker who is given articles of jewellery for sale by their owners is a mercantile agent. He can make a valid pledge, though the articles were given to him because of a false representation².

5. Possession.—The application of the repealed section was sought to be restricted by putting a narrow meaning upon the word 'possession'. This word

13 *Secretary of State v. Rishi Ram*, 50 A 227; but see *Mercantile Bank v. Official Assignee, Madras*, 64 MLJ 320; *Piari Lal v. E. I. Ry.*, 46 A 691.

14 *Sethna v. National Bank*, 12 Bom. LR 870.

15 *Khoo Eo v. Nanigram*, 40 IC 86.

16 *Jyoti v. Mukti*, 33 IC 891.

17 *N. Y. Kaisha v. Ram*, (1938) 2 Cal 381.

18 *Harrold v. Plenty*, (1901) 2 Ch 314.

19 See definition given in s. 2(9) of the Sale of Goods Act.

20 *Lloyd's Bank v. Bank of America*, (1938) 2 KB 147.

1 *Weiner v. Harris*, (1910) 1 KB 285; (1908-10) All ER Rep 405.

2 *U. Sulaiman v. Ma Ywet*, 7 R 72.

was construed to mean juridical possession as distinguished from custody, "that kind of possession which a factor or agent has"³. The possession, therefore, must be such a possession as an owner has, not a possession for a specific purpose, or a qualified possession such as a hirer of goods has⁴. But this meaning of the term has not been always adhered to. Thus, it has been held that the term 'possession' has been used in the section in its natural and ordinary sense and not in a restricted or technical sense and a pledge by a seller remaining in possession has been held valid⁵. Consistently with the former view (under the old section) it was held that a pledge by a servant⁶, or by an agent entrusted with custody of goods⁷, or by a husband of his wife's jewellery⁸, or by a hirer of goods⁹, or by a gratuitous bailee¹⁰, or by a pledgee¹¹, was not valid, inasmuch as the pledgor in such a case had detention or custody but not juridical possession. The modern view is that possession may be the possession of the owner as well as of a mercantile agent¹². A broker employed to obtain offers for goods for approval by the owner may make a valid pledge contrary to the owner's instructions¹³. A bailor is entitled to recover goods from an innocent purchaser for value from the bailee for a specific purpose who has a qualified possession. Although a bailee may be in some respects in a fiduciary position as regards his bailor it is a very different thing from saying that a bailee is a trustee pure and simple¹⁴. Prior to the amendment possession under the section meant, as has been pointed out, juridical possession, or the possession of a factor, or an agent, entrusted, as such, and ordinarily having as such agent power to sell or pledge the property. Possession under the section, as amended, is restricted to that of a mercantile agent with the consent of the owner¹⁵. Under the English Factors Act, 5 and 6 Vict. c. 39, where a third person has entrusted goods, or documents of title to goods to an agent, the agent in the course of such agency may sell or pledge them. The rule applies to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed. A warehouse-keeper who has goods deposited with him cannot make a valid pledge of them¹⁶.

3 *Seshappier v. Subramania*, 40 M. 678; *King Emperor v. Nga Po*, 1 Rang 199; *Sharafdin v. Gokal*, 132 IC 835.

4 *Nagananda v. Bappu*, 27 M 424; *Nandlal v. Bank of Bombay*, 12 Bom LR 316, 335

5 *Rahimbux v. Central Bank*, 56 C 367.

6 *Biddomoye v. Sittaram*, 4 C 497.

7 *Kodumal v. Karachi Bank*, 82 IC 730; *Shankar v. Lakshmibai*, 30 Bom LR 470.

8 *Seager v. Hukma*, 24 B 458.

9 *Nagananda v. Bappu*, 27 M 424.

10 *Shankar v. Mohanlal*, 11 B 704; *Ramasami v. Kamalammal*, 45 M 173; *Ramkishendass v. Jasumal*, 61 IC 305; see *Katta v. Kamalammal*, 42 MLJ 32.

11 *Roop Chand v. National Bank*, 48 IC 975.

12 *Official Assignee v. Mercantile Bank*, 58 M 181 PC; law fully stated.

13 *Durgabai v. Sarasvatibai*, 31 Bom LR 414.

14 *Katta v. Kamalammal*, 42 MLJ 32.

15 *Poona Bank v. Kachhi*, 33 Bom LR 848; *Sharafdin v. Gokal*, 132 IC 835; *Nandlal v. Bank of Bombay*, 12 Bom LR 316.

16 *Cole v. N. W. Bank*, LR 10 CP 354: (1874-80) All ER Rep 486.

Hirers of goods under a hire-purchase agreement may have an option to buy, but inasmuch as there is no obligation to purchase they cannot be called persons who have agreed to buy. The pledgee from the hirers has no right to the goods as against their owner seeking to recover them on account of the hire-purchase money remaining unpaid¹⁷. In this country possession under a hire-purchase system has been held not to be possession under the old section¹⁸, but the contrary view has also been maintained¹⁹. The question however has lost its importance after the amendment of the section.

It is well settled that a mere contract of hiring, without more, is a species of the contract of bailment which does not create a title in the bailee, but the law of hire-purchase has undergone considerable development during the last half a century or more and has introduced a number of variations, thus leading to categories, and it becomes a question of some nicety as to which category a particular contract between the parties comes under. Ordinarily, a contract of hire-purchase confers no title on the hirer, but a mere option to purchase on fulfilment of certain conditions. But a contract of hire-purchase may also provide for the agreement to purchase the thing hired by deferred payments subject to the condition that title to the thing shall not pass until all the instalments have been paid. There may be other variations of a contract of hire-purchase depending upon the terms agreed between the parties. When rights in third parties have been created by acts of parties or by operation of law, the question, which does not arise here may arise as to what exactly were the rights and obligations of the parties to the original contract. It is equally well settled that for the purpose of determining as to which category a particular contract comes under, the court will look at the substance of the agreement and not at the mere words describing the category. One of the tests to determine the question whether a particular agreement is a contract of mere hiring or whether it is a contract of purchase on a system of deferred payments of the purchase price is whether there is any binding obligation on the hirer to purchase the goods. Another useful test to determine such a controversy is whether there is a right reserved to the hirer to return the goods at any time during the subsistence of the contract. If there is such a right reserved, then clearly there is no contract of sale (vide *Helby v. Matthews*, 1895 AC 471)²⁰.

6. In good faith.—The words “in good faith” imply that a pledge is not valid if the pawnee is aware that the mercantile agent making the pledge has no authority to make the same or is acting *mala fide* against the owner¹. But the pledge would be valid if the pawnee acted in good faith and had not at the time of the pledge noticed that the pawnor had no authority to pledge².

17 *Belsize Motor Supply Co. v. Cox*, (1911-13) All ER Rep 1084; (1914) 1 KB 244; see *Helby v. Matthews*, 1895 AC 471; (1895-99) All ER Rep 821.

18 *Leon v. Seyne & Bros.*, 23 CWN 352.

19 *Abdul v. Rang Lal*, 34 PR 1902.

20 *Damodar Valley Corporation v. State of Bihar*, AIR 1961 SC 440, 445, 446. See also *Instalment Supply (P) Ltd. v. Union of India*, AIR 1962 SC 53, 57-8.

1 *Gobind v. Ryan*, 9 MIA 140, 162.

2 *U. Sulaiman v. Ma Ywet*, 7 R 72, see next section.

A pledgee bank is not authorised to invoke the aid of sec. 178 where it is negligent in not verifying whether the commission agent pledging goods is the owner of those goods or whether he is acting on behalf of the owner³. An authority to an agent to sell G. P. notes does not give an authority to pledge. The pledgee, therefore, acquires no title to the notes pledged⁴. If a person obtains goods from another by means of a criminal offence or fraud and pledges them, the pledge is invalid and the person who has accepted the pledge must return the goods to the true owner⁵. The words of the first proviso to the old section were held to be wide enough to include the obtaining of possession from the lawful owner not only by the pawnor but also by some other person from whom the pawnor derived possession⁶. The words "in good faith" have not been defined in the Act but have been defined in the Limitation Act and in the Penal Code. The definition given in General Clauses Act (10 of 1897) cannot apply to the Contract Act, 1872⁷. Yet the words have been generally understood to bear the same meaning as is given in the General Clauses Act. The general rule of English law is to the same effect⁸. Where an executor misappropriates certain shares of a deceased testator and pledges them, they cannot be recovered without paying what is due to the pledgee for the loan paid to the executor⁹. The onus is on the plaintiff, who seeks to impugn a valid disposition, to prove bad faith and other matters required by the section¹⁰.

Priority between mortgagee and pledgee.—A mortgagee of goods, even though the mortgage be unaccompanied by possession, has priority over the claims of the pledgee¹¹.

178A. Pledge by person in possession under voidable contract.—When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

Where there is a delivery of a piece of jewellery to a person (a gratuitous bailee) for the purpose of ascertaining its value and deciding whether he can make

3 *Indian Bank v. A. S. Rao & Sons*, AIR 1971 AP 287, 292.

4 *Jonmenjoy v. Watson*, 10 C 901, 912.

5 *Chettyar Firm v. Daw*, 120 IC 911; see *Jamshedji v. Maganlal*, 27 Bom LR 514 (old section as to meaning of 'fraud').

6 *Poona Bank v. Kachhi*, 3 Bom LR 848; *Sethna v. National Bank*, 12 Bom LR 870 disapproved.

7 *Poona Bank v. Kachhi*, 33 Bom LR 848.

8 *Madras Automobiles v. Modern Bank*, 182 IC 25.

9 *Sethna v. National Bank*, 12 Bom LR 870; see *Sundar v. Bhagwan*, 30 A 165 (pledge of property of minor) decision under the old section.

10 *N. I. Kaisha v. Ramjiban*, (1938) 1 MLJ 834 PC.

11 *Shrish v. Mungri*, 9 CWN 14; *Damodar v. Atmaram*, 8 Bom LR 344.

an advance on it, though the delivery of the jewellery is for the purpose of bailment, it is also a good delivery for the purpose of creating a pledge, when the bailee actually advances a sum, and if then the bailee makes a repledge, which he has no right to do, the owner is not entitled to recover from the repledgee without tendering what is due to the repledgee¹². If goods be obtained from A by fraud and pawned to B who has no notice of the fraud, and A obtains possession of the goods from B by prosecuting him, B may sue for recovery of possession of the goods¹³. But if a man pledges to another property to which he has no title, and which he has no right to pledge the real owner may interpose and get possession of the property¹⁴. Goods entrusted for safe custody cannot be pledged by the deposittee. If the contract of bailment be voidable under S. 19 or S. 19A it cannot come under S. 178 or S. 178A¹⁵.

A pledge of movable property by a person who has been entrusted with possession of the same is valid against the true owner if the pledgee has acted in good faith, even though in making the pledge the pawnor has committed a criminal breach of trust against the true owner¹⁶. If a person get some jewellery from a shop representing that he takes them on 10 days' inspection and would purchase them if not returned within the 10 days, and immediately thereafter pledges them, the jewellery having been obtained by an offence (cheating or fraud), the owner is entitled to recover them from the pawnee¹⁷. A pledgor fraudulently taking delivery of the goods pledged has bare custody of them and not possession and so cannot pledge them again. The first pledgee is not debarred by his negligence from claiming to recover the goods from the second pledgee¹⁸. Where a mercantile firm obtains possession of certain goods from shippers and hypothecates them with a bank, the pledge is valid as no fraud is established in connection with the transaction. It has been doubted whether the definition of the "fraud", as given in S. 17, was intended to apply to the word 'fraud' as used in this section¹⁹.

179. Pledge where pawnor has only a limited interest.—Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

The section.—The section does not limit the scope of S. 178, but saves a pledge to the extent of the pledgor's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to S. 178. In other words, whenever he has an interest, the person in possession of the

12 *Blundell-Leigh v. Attenborough*, (1921) 3 KB 225 : (1921) All ER Rep 525 ; *Tilley v. Bowman*, (1910) 1 KB 745 : (1908-10) All ER Rep 952.

13 *Parker v. Patrick*, 5 TR 175.

14 *Cheeseman v. Excell*, 20 LJ Ex 209.

15 *Visalakshi v. Nidhi*, 1942 M 299.

16 *Shue Ma v. Metha*, 105 IC 452 ; *Chettyar Firm v. Non*, 157 IC 184 ; *Devidan v. Janaki*, 1932 M 428.

17 *Kartick v. Gopal*, 3 C 264.

18 *Mercantile Bank v. Central Bank*, 69 MLJ 509.

19 *Chartered Bank v. Imperial Bank*, 60 C 262.

goods or documents has unconditional authority to charge at least that interest. Where an upcountry cotton merchant consigned cotton to his usual agents for sale, who, to the knowledge of the consignor, used to pledge it and remit the money to the consignor, *held* that the pledge was valid under S. 178, the cotton being in the possession of a mercantile agent²⁰. But it has been pointed out that S. 179 does not refer to "possession" or to documents of title. Any person having a limited interest in goods may pledge them to the extent of that interest¹. Under English law, a person having a limited interest, it seems, is not entitled to pledge under certain circumstances. Thus *A* and *B* are co-owners of an article. *A* by agreement being in possession of it. *A* entrusts it with *B* for sale. *B* pledges it. The transaction amounts to a bailment to *B* for a special purpose which he did not carry out and on failure of the trust, *A*'s right to immediate possession accrues at once².

Under a contract entered into by the pledgor Bank with the pledgee Bank, the securities owned by the pledgor of the face value of Rs. 75,000 were to be kept by the pledgee Bank charged with the payment of such amount up to the limit of Rs. 66,150 as may from time to time have been advanced or be advanced to the pledgor Bank under the overdraft arrangement. But that charge was not an absolute one without reference to the state of accounts between the two Banks; in other words, there was to be a charge only when there was an adverse balance against the pledgor Bank. At all material times the pledgor Bank had not drawn any sum from the pledgee Bank in pursuance of the agreement. It was held by the Supreme Court—

(i) that the right of the pledgee Bank to deal with the securities under the agreement would arise only on the happening of certain events, namely, that the pledgor Bank either had failed to maintain the proper margin or had made a default in repayment of the outstanding amount on demand by the pledgee Bank. So long as those contingencies did not arise, the pledgee Bank had no right to deal with the securities by way of pledge, sub-pledge or assignment; and

(ii) that if the pledgor Bank had as a matter of fact operated upon the overdraft account and had drawn any sum within the limit stipulated in the contract, the pledgee Bank would have an interest within the meaning of S. 179, Contract Act, *pro tanto* in those securities and might then have been entitled to pledge or sub-pledge the securities with a third party. But so long as there was no overdraft by the pledgor, the pledgee had no such interest as it could in its turn pledge or sub-pledge to a third party³.

Suits by Bailees or Bailors against Wrong-doers

180. Suit by bailor or bailee against wrong-doer.—If a third person wrongfully deprives the bailee of the use or possession of

²⁰ *Lakhamsey v. Lakhmichand*, 42 B 205.

¹ *Haji Rahimbux v. Central Bank*, 56 C 367, 388.

² *Nyberg v. Handelaar*, (1892) 2 QB 202 : (1891-94) All ER Rep 1109.

³ *Jeswantrai v. State of Bombay*, AIR 1956 SC 575.

the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made ; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

The section.—Either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrong-doer, the latter by virtue of his possession, the former by reason of his property⁴. The bailee can sue because the wrong-doer is quite unconcerned with what the rights are between the bailor and the bailee and must treat the possessor as the owner of the goods for all purposes, quite irrespective of the rights and obligations as between him and the bailor⁵. On the other hand, on an injury to a boat the owner was held entitled to sue although the boat was out on hire at the time. The owner's right was not affected by the temporary outstanding interest of the bailee⁶.

Delivery of tangible property is ordinarily essential to a true pledge ; where, however, the law recognizes that delivery of tangible symbol involves a transfer of possession of the property symbolized, such a symbolic possession takes the place of physical delivery. Thus, the goods covered by a railway receipt can be pledged by transferring the receipt.

Under S. 180 the pledgee will have the same remedies as the owner of the goods would have against a third person for deprivation of the said goods or injury to them. Thus, a bank, if it be a pledgee though it had advanced to the owner Rs. 20,000 only can maintain a suit against the railway for the recovery of the full value of the consignments amounting to Rs. 35,000.

Where a trader after purchasing goods with money borrowed from a bank consigns the goods to a railway and thereafter executes a promissory note in favour of the bank and endorses the railway receipts to the bank, the effect of such execution and enforcement is to make the bank a pledgee of the goods represented by the receipts⁷. Endorsee of a railway receipt for valuable consideration can sue the railway for loss of goods⁸.

181. Apportionment of relief or compensation obtained by such suits.—Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

4 *Manders v. Williams*, 4 Ex 339, 344 : (1843-60) All ER Rep 545, cited in *Ramnath v. Pitambar*, 43 C 733 ; *D'Souza v. Jairabhoj*, 58 B 189 bailee not the agent of the bailor. The bailee's action will be without prejudice to the rights of the bailor.

5 *Winkfield*, 1902 P 42 : (1900-03) All ER Rep 346.

6 *Mears v. L. & S. W. Ry.*, 11 CBNS 850.

7 *Morvi Mercantile Bank v. Union of India*, AIR 1965 SC 1954, 1955.

8 *Ganpatrai Sagarmull v. Union of India*, AIR 1975 Cal 265.

CHAPTER X

AGENCY

Appointment and Authority of Agents

182. “Agent” and “principal” defined.—An “agent” is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the “principal.”

1. Agent.—Agency is founded upon a contract, either express or implied. The authority of the agent to act is a derivative authority¹. Agency need not necessarily be established by a written document. It may be inferred from circumstances of which proof should be forthcoming². The use of the word “agent” is not decisive of the character of agency of a party³. It is well known that in certain trades the word “agent” is often used without any reference to the law of principal and agent. Thus, in the motor trade the persons described as “agents” are not agents in respect of any principal, but are purchasers who buy from manufacturers and sell independently of them⁴. It is difficult to determine sometimes whether a party is an agent or buyer. The test to determine whether a person selling goods supplied by another is an agent or not is whether he is supposed to be selling his own goods or those of his principal⁵. The provisions of the Act relating to agency are not exhaustive⁶. The Act lays down certain general principles in wide terms about agency. All agents cannot be placed in the same category. Commission agents are agents within this section, but not agents pure and simple⁷.

When a person undertakes to save an estate from an impending auction sale by putting in an application on behalf of all the cosharers, even though gratuitously, he becomes their agent within the meaning of the section⁸. The definition is wide enough to include a person employed to sell unredeemed articles from a pawnshop on behalf of an employer⁹. The position of directors of a public company is that of the agent of the company¹⁰. There

1 *Mohesh v. Radha Kishore*, 12 CWN 28.

2 *U. Lat v. U. Pan*, 1938 R 145; *Shaw v. Shah*, 1950 Hy 52.

3 *Re Nevill*, LR 6 Ch 397; *Re Smith*, 10 Ch D 566; *Re Cotton*, 108 LT 310.

4 *Lamb v. Goring Brick Co.*, (1932) 1 KB 710; see *Motor Union Insce. Co. v. Mannheimer*, (1933) 1 KB 82.

5 *Phul v. Agarwal*, 1938 L 814.

6 *Thimappa v. Putti*, 1941 M 6.

7 *Kaliyan v. Tika*, 1938 N 254.

8 *Bhoobun v. Ram*, 3 C 300.

9 *Ah Cheung v. Wain*, 1938 R 243.

10 *Wilson v. Bury*, 5 QBD 518, 526; *People's Bank v. Hargopal*, 1936 L 268.

is nothing to prevent a servant from being an agent if he be employed as such¹¹. In the absence of a contract to the contrary, the ordinary rule is that where goods are delivered to a carrier for transmission to the buyer, the carrier is presumed to be the buyer's agent not only to take delivery but to assent to the appropriation of the goods¹². Every partner is an agent of the firm and of the other partners for the purposes of the business of the partnership¹³. A solicitor employed for sale of property receiving the deposit money holds it as agent for the vendor. His position in no degree resembles that of an auctioneer¹⁴. The pleader is the agent of the client, a disclosed principal¹⁵.

A receiver appointed by the court is not the agent of the court or of anybody else but is a principal¹⁶, and is personally liable to persons dealing with him unless the express terms of the contract exclude his personal liability¹⁷. But a receiver appointed by a mortgagee under the ordinary power for that purpose is in possession as agent not of the mortgagee but of the mortgagor¹⁸. A receiver appointed by the debentureholders is their agent and has authority to pledge the assets in priority to the debentures¹⁹. A stevedore employed in unloading a vessel is not the servant or agent of the shipowner, he has entire control over the men employed in the work²⁰. A subsequent mortgagee paying off a prior encumbrancer does not act as the agent of the mortgagor¹. A direction to pay money to another will not make that other the agent of the person giving the direction, unless it is also directed to be paid on behalf of the person giving the direction and the money has been so accepted by the other person². When a sum of money is deposited in a bank as security, the bank acts as the buyer's agent, and on its failure the buyer ought to pay the amount³. Agency is the creation of a contract, so the president is not the agent of a municipal committee⁴. Where a contract is entered into between *A* on one side, *B* and *C* on the other, but the contract is only signed by *B*, *B* cannot be treated as the agent of *C*⁵. The manager of a joint Hindu family is not the agent of the family in the strict sense of the term⁶, so is not liable to render accounts to the latter as principals⁷. He

11 *Ganeshdas v. Gangaram*, 123 IC 228.

12 *Mayamal v. Sanday Patrick & Co.*, 12 IC 662.

13 *Abdul v. Gopeswar*, 56 CLJ 172.

14 *Eagell v. Day*, LRICP 80.

15 *Bidhu v. Ahmed*, 42 CWN 1263.

16 *Parsons v. Sovereign Bank*, 1913 AC 160, 167; *Boehm v. Goodall*, (1911) 1 Ch 155, 161; (1908-10) All ER Rep 485; *Patrick v. Lyan*, 1938 R 611.

17 *Ramnarayan v. Carey*, 58 C 174; *Patrick v. Lyan*, 1938 R 611; but see *Jotindra v. Rajendra*, 8 CLJ 114.

18 *Jeffreys v. Dickson*, LR 1 Ch 183, 190.

19 *Robinson Printing Co. v. Chic*, (1905) 2 Ch 123.

20 *Murray v. Currie*, LR 6 CP 24.

1 *Tota Ram v. Ram Lal*, 54 A 897 FB.

2 *Hari v. Taraprasanna*, 79 IC 354.

3 *Harisingh v. S. of S.*, 1932 L 34.

4 *Tavoy M. Committee v. Khoo*, 164 IC 410.

5 *Muni v. Thandava*, 1936 M 5.

6 *Kandasami v. Somaskanta*, 20 MLJ 371.

7 *Biraj v. Abani*, 42 CWN 1157.

has, however, an implied authority to contract debts for the ordinary purposes of the business carried on by the family⁸. Their relations are more like those of trustee and *cestui que trust*⁹. A joint family is a juristic person on whose behalf contracts can be entered into and enforced. The word 'person' in this Act includes a joint family¹⁰. There is no presumption that when a Burmese Buddhist couple is living together, one acts as the agent of the other. It is a question of fact to be determined upon the evidence before the court in each case¹¹. The ordinary doctrines of agency and of master and servant are applicable to corporations as well as to ordinary individuals¹². There is a well-marked distinction between the relation of agency and that of trust. An agency may often involve a relation of trust and confidence, and the property in the hands of an agent may sometimes be impressed with a trust for the benefit of a principal. In such circumstances an agent may not be allowed to set up the law of limitation in bar of a suit for accounts by the principal¹³. Money received by the Crown from Germany as compensation for damage done to the civilian population during the war could not be claimed by the population, as the Crown did not hold the money either as trustee or as agent¹⁴. The difference between the relationship of master and servant and that of principal and agent is that a principal has the right to direct what work the agent is to do, but a master has the further right to direct how it is to be done. The relationship between master and servant is a question of fact¹⁵.

An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant¹⁶. A servant is under the control of his principal not only as to what he does but also as to the manner in which he executes his work¹⁷; the

8 *Maluk v. Daya*, 106 IC 183; *Pirithi v. Mamchand* 156 IC 539.

9 *Annamalai v. Murugasa*, 7 CWN 754 PC.

10 *Shankar v. Toshani*, 32 ALJ 453.

11 *Chettyar Firm v. Than*, 9 R 524.

12 *Citizens' Life Assce. Co. v. Brown*, 1904 AC 423, 426: (1904-07) All ER Rep 925.

13 *Kali v. Hari*, (1938) 1 Cal 652.

14 *C. W. C. Asscn. v. The King*, 1932 AC 15.

15 *Indo U. Assce v. Srinivasan*, 1946 M 530; *Goolbai v. Pestonji*, 1935 B 333.

16 *Lakshminarayan v. Govt. of Hyderabad*, AIR 1954 SC 364, 367, quoting Halsbury's *Laws of England*, Hailsham ed., Vol. I, para 345. See also *Q. S. Tyabji v. Commissioner, EPT., Hyderabad*, AIR 1960 SC 1269.

17 *Mersey Docks etc. Board v. Coggins Griffith*, (1947) AC 1.

independent contractor is not under the control of the principal in his manner of execution¹⁸.

The *prima facie* test for the determination of relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work. The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer¹⁹.

As to the distinction between general and special agents, see *Vardaji v. Chandrappa*²⁰. The authority of a particular agent varies according to circumstances. As to where a person may be said to carry on business through an agent, see *Fleming Shaw & Co. v. Bahadur & Co.*¹. As to the distinction between a *kucha arhatia* and a *pucca arhatia*, see *Sheo v. Bhallar*². Contracts with commission agents do not follow a single pattern, so the term of the contract in each case has to be precisely ascertained³.

2. **Commission agent in a foreign country.**—Where an agent in England buys for a foreigner resident abroad, a long series of decisions has established that the agent is generally to be considered as pledging his own credit, because it is highly improbable that the seller would have given credit to the foreigner. But where the contract is made in writing expressly with the foreigner, and not with the agent, the latter is not liable. In a simple contract (even a foreign contract) an agent signing for his principal, if acting within the scope of his authority, binds the principal⁴. The legal relation between a merchant in one country who orders goods of a commission agent in another is of a twofold character. The relation is one as between principal and agent, though when the goods are shipped the commission agent stands in contemplation of law as vendor to the principal⁵. There is no privity between the person selling the goods to the commission agent and the foreign merchant⁶. It is the duty of the commission agent to inform the merchant abroad that his order cannot be carried out because the goods ordered are not available⁷.

Where an agent in England contracts on behalf of a foreign principal, he is presumed to contract personally unless a contrary intention plainly

18 *Honeywith & Stein Ltd. v. Larkim*, (1934) 1 KB 191, 196.

19 *Dharangadhra Chemical Works Ltd. v. State of Saurashtra*, AIR 1957 SC 264, cited in *Harish Chandra v. Triloki Singh*, AIR 1957 SC 444.

20 41 B 40.

1 1936 S 121.

2 1950 A 352.

3 *Ahmed v. Mitter*, 1950 SC 15.

4 *Mahony v. Kekule*, 23 LJCP 54.

5 *Ireland v. Livingston*, LR 5 HL 395 : (1861-73) All ER Rep 585.

6 *Mahomedally v. Schiller & Co.*, 13 B 470.

7 *Cassaboglou v. Gibb*, 11 QBD 797, see as to measure of damages for default.

appears from evidence contained in the document itself⁸, or in the surrounding circumstances⁹. If there is no such evidence, the presumption prevails that the agent has no authority to pledge the credit of the foreign principal in such a way as to establish privity between such principal and the other party, and that he is personally liable on the contract. In other words, the rule is one of evidence than of law, and the question to be determined is really one of fact¹⁰. The agent having no authority to pledge the credit of his foreign principal, the latter is not under any liability to the person with whom the commission agent is contracting. In these cases the only liability of the foreign principal is to his own agent, the agent alone is liable to the person with whom he makes the contract. If, upon the contract, the foreign principal is directly liable to the person with whom the agent contracts, this provision is inconsistent with the custom, and the custom is thereby excluded¹¹. In the case of a partner of a foreign firm buying in this country, under the ordinary rules of partnership transaction the firm is liable, unless, as in the case of any other partnership business, the vendor elects to rely on the credit of the person who appears in the transaction to the exclusion of the other¹².

But the incidents of the relationship between a merchant in one country and a firm of commission agents in another may be varied by custom. Thus, according to the custom of trade in Bombay when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe at a fixed price and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturers. It makes no difference that the firm receives commission or trade discount from the manufacturers with or without the knowledge of the merchant¹³.

As pointed out by Viscount Simon, Lord Chancellor, in *Luxor (Eastbourne), Ltd. v. Cooper*, 1941 A. C. 108 : 110 L. J. K. B. 131, contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion¹⁴.

3. *Del credere agent*.—A *del credere* agent is one who for an extra remuneration undertakes the liability to guarantee the due performance of the contract by the buyer. By reason of his charging a *del credere* commission he assumes responsibility for the solvency and performance of their contract by the vendees and thus indemnifies his employer against loss¹⁵. He, therefore,

8 *Gadd v. Houghton*, 1 Ex. D 357.

9 *Glover v. Langford*, 8 TLR 628.

10 *Elbinger v. Claye*, LR 8 QB 313, refd. to in *Harper & Sons v. Keller*, 84 LJ QB 1696; *Green v. Kopke*, 25 LJ CP 297.

11 *Miller Gibb & Co. v. Smith*, (1917) 2 KB 141, 150.

12 *Bottomley v. Nuttall*, 28 LJCP 110 : 141 ER 48.

13 *Paul v. Chotalal*, 30 B 1, 23.

14 *Abdulla Ahmed v. Animendra*, AIR 1950 SC 15, 20.

15 *Gabriel & Sons v. Churchill*, (1914-15) All ER Rep 953 : (1914) 3 KB 1272; *Coutourier v. Haslie*, 22 LJ Ex. 97 : (1843-60) All ER Rep 280.

gives an additional security to the seller, but that does not shift the responsibility of payment from the buyer to the seller¹⁶. A commission *del credere* is the premium or price given by the principal to the agent for guarantee, it presupposes a guarantee. A demand on the principal debtor must be proved before the agent can be held liable. The guarantor is to answer for the solvency of the vendee and to pay the money if the vendee does not¹⁷. A *del credere* agent, like any other agent, is to sell according to the instructions of his principal, to make such contracts as he is authorised to make for his principal and he is bound, as soon as he receives the money, to hand it over to the principal. He is distinguished from other agents simply in this that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them¹⁸. He does not guarantee that the goods will be of the contract quality, so he is entitled to sue on a bill of exchange sent to the buyer for the goods supplied which bill is accepted by the buyer¹⁹. A *del credere* agency may arise by implication from the course of dealings between the parties, e.g., from the charging of the extra commission for risk²⁰. But the description by a party of himself in a contract as a *del credere* agent of the other party does not necessarily make him so¹. The position of a *pakka adatia* as agent is analogous to that of a *del credere* agent. A *del credere* agent incurs only a secondary liability towards the principal. His legal position is partly that of an insurer, and partly that of a surety, for the parties with whom he deals to the extent of any default by reason of insolvency or something equivalent². Where a firm was appointed sole banians of a company to sell goods manufactured by the company, to be responsible to the company for the payment by the buyers of the price due, to guarantee the performance of the contracts by the buyers through them, and was to get a certain commission on contracts entered into through them, the firm was the agent of the company³. But an agreement by a party that on payment of a certain commission to him, he will be liable for the losses sustained by the other party is a contract of indemnity and not a *del credere* agency⁴.

4. Where there are several agents—Where an authority is expressly given to several persons with no stipulation that any one or more of them shall be authorised to act in the name of the whole body, they have a joint authority and therefore all of them must join in exercising the authority in the absence of a provision that some shall form a quorum⁵. Where, however, the authority is given jointly and severally, each one of such persons may act upon

16 *Hornby v. Lacy*, 6 M & S 166.

17 *Morris v. Cleasby*, 4 M & S 566.

18 *Re Nevill*, LR 6 Ch 397, 403.

19 *Churchill v. Goddard*, (1937) 1 KB 92.

20 *Shaw v. Woodcock*, 7 B & C 73.

1 *Nouvelles Huileries v. Mann & Co.*, 40 TLR 804.

2 *Champa v. Tulshi*, 105 IC 739.

3 *Srivilas v. Tinnevely Municipal Council*, 106 IC 334.

4 *Montagu v. Solomon*, (1932) 1 KB 611 affmd. 2 KB 287.

5 *Brown v. Andrew*, 18 LJQB 153; *Bell v. Nixon*, 9 Bing. 393; *Nand v. Chand*, 2 IC 305.

the authority and bind the principal⁶. Where a quorum is necessary, then the principal will not be bound unless the number of men necessary to form the quorum were to act⁷. Where work of a public nature has been entrusted to an agent the decision of the majority will be binding⁸. Where the articles of association of a company provide that the business of a company shall be conducted by a specified number of directors, the acts performed by less than the specified number are invalid⁹. Where *A* executed a power of attorney authorising *B*, *C* and *D* to borrow money for and sign on behalf of *A*, *B* signed a mortgage deed on behalf of *A*, and it was attested by *C* and *D*, *A* was held liable, although the general rule no doubt is that where authority is given to two or more persons jointly, all the co-agents must concur in the execution of it in order to bind the principal, in the absence of a provision that some alone shall form a quorum¹⁰.

183. Who may employ agent.—Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

The section.—An infant by holding himself out as partner and contracting a contractual obligation can bind a firm and its assets¹¹. A power of attorney executed by a man of unsound mind is void and the deed of transfer executed on the authority of such a power is a nullity¹².

184. Who may be an agent.—As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Minor can be agent.—Under the section a minor can act as an agent. The fact that an active minor member of a firm applies for shares does not vitiate the contract¹³. A minor can become a partner and bind his co-partners as if he were their agent. He may do so by making a promissory note, though he may be unable to make one so as to bind parties who are not his partners¹⁴. Under the English law also a minor may be an agent¹⁵.

6 *Guthrie v. Armstrong*, 5 B & Ald 628.

7 *Ridley v. Plymouth Banking Co.*, 2 Ex 711; *Kirk v. Bell*, 16 QB 290; see *Re Liverpool Association*, 59 LJ Ch 616.

8 *Grindley v. Barker*, 1 Bos & P 229

9 *Bottomley's Case*, 16 Ch D 681; *Re Sly Spink & Co.*, (1911) 2 Ch 430.

10 *Nand Dularey v. Chand*, 6 ALJ 462; *Amrit v. Bhagwan*, 1939 B 435.

11 *Goode v. Harrison*, 5 B & Ald 147.

12 *Daily Telegraph Ltd. v. Mc. Laughlin*, 1904 AC 776.

13 *Gopi Mal v. Jain Bank*, 45 IC 17.

14 *Maung Aung v. Haji Dada*, 42 IC 98.

15 *Andrews v. Andrews*, 15 Ch D 228, 246: (1874-80) All ER Rep 1184.

185. Consideration not necessary.—No consideration is necessary to create an agency.

186. Agent's authority may be expressed or implied.—The authority of an agent may be expressed or implied.

Express or implied authority.—The relation of agency arises whenever one person called the agent has authority express or implied to act on behalf of another called the principal and consents so to act¹⁶. If implied, the agent's authority may be inferred from the circumstances of the case, from things spoken or written, or the ordinary course of dealing¹⁷. The settlement of the terms of agency does not constitute a contract of agency unless authority to act is conferred and accepted. If a person does a commission agency business he is not in law the agent of all the persons (or firm) for whom he transacts the business or from whom he hopes to get orders. The contract of agency is effected by the principal requesting the agent to buy or sell and by the agent indicating his consent so to act¹⁸. A broker is *prima facie* the agent of the party who first employs him. To make him an agent for the other parties there must be evidence of something more than mere negotiation. There must be words or conduct by which an authorisation to act on behalf of the other parties is expressed or is to be affirmatively inferred¹⁹. Agency need not be created expressly by any written document and can be inferred from circumstances and the conduct of the parties²⁰. In order to establish that an agent had an implied authority to enter into a contract on behalf of the principal it must be shown that a particular contract which is sought to be made binding on the principal falls within the class of contracts which the agent was authorised to enter into in the course of his duty¹.

187. Definitions of express and implied authority.—An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

¹⁶ See *Mohesh v. Radha*, 12 CWN 28, cited under S 182.

¹⁷ *Bissessar v. Kabul*, 1945 N 121.

¹⁸ *Vishinji v. Jasraj*, 50 IC 146.

¹⁹ *Handandass v. Mohori*, 8 IC 601.

²⁰ *Khub Chand v. Chittar Mal*, 29 ALJ 225.

¹ *Sri Gopal v. Sasi*, 36 CWN 1108; see *Shah Muhammad v. Ahmad*, 153 IC 987, 990.

1. **Express authority.**—In some cases the appointment of an agent must be expressly made. The appointment of a pleader, i.e., a vakil or attorney, to appear or act for any person must be in writing in a manner required by Order III, r. 4 and cannot be revoked at the mere will of the client². The appointment of a person to present a document for registration is by the Registration Act, 1908 (S. 32), required to be made by a power of attorney executed and authenticated in the manner prescribed by the Act³. An express appointment may be oral even though the contract which the agent is authorised to make has to be in, or evidenced in, writing⁴.

An agent acting under an implied authority can bind his principal only by acting within the ordinary scope of his employment⁵. An agent of a moneylender acting under an express power of attorney has authority to borrow money by pledging the firm's credit in order to advance money to borrowers⁶. Merely entrusting an agent with a certain work does not prevent the principal from doing the work himself. It is otherwise if the contract contain express words indicating a prohibition against the performance of the act by the principal himself. In the former case the agent is not entitled to his commission. The law of agency in election cases goes much further than the ordinary law of principal and agent. There may be no direct proof of an actual appointment of an agent. A man may be proved to be an agent of a candidate on various facts and circumstances leading to such inference in a particular case⁷. But no question of implied authority arises where the agent's authority is defined in writing, for then "the authority in question is to be found within the four corners of the instrument"⁸.

2. **Liability of husband for wife's debt.**—If a man, without any justifiable cause, turns away his wife, he is bound by any contract she makes for necessities suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessities, or the means of obtaining them, then she is at liberty to pledge her husband's credit for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessities, the husband is not bound by the contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent. Co-habitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; when such assent is proved, the wife is the agent of the husband duly authorised⁹. "Whether a wife has authority to pledge her husband's credit is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from

2 *Sundararaja v. Pattanathusami*, 17 M 306; *Atul v. Lakshman*, 36 C 609.

3 C & S 471.

4 *Heard v. Pilley*, (1869) LR 4 Ch App 548.

5 *Daun v. Simmins*, 41 LT 783.

6 *Bank of Bengal v. Ramanathan*, 43 IA 48, 54.

7 *Bentall v. Vicary*, (1931) 1 KB 253; *Jamuna v. Jogendra*, 1951 Pat 209.

8 *Goolab v. Miller*, (1938) 2 MLJ 688, citing *Bank of Bengal v. Ramanathan*, 43 IA 48; *Poboodem v. Miller*, 1938 M 966; *Overbrooke Estates Ltd. v. Gleneombe Properties Ltd.*, (1974) 3 All ER 511.

9 *Montague v. Benedict*, 3 B & C 631, 2 Sm. LC 477, 13 Ed.

any particular state of circumstances"¹⁰. In all the cases in which it is sought to make a husband responsible for goods supplied to the order of his wife, the question has turned upon her authority to bind him by her contract; and that authority must be proved as in all other cases. The law infers that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live¹¹. A married Hindu woman can bind her husband, even without authority, by her contracts on the ground of necessity¹². The liability of a husband for his wife's debts depends on the principle of agency, he can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done¹³. Where the articles purchased by the wife can be considered to be necessities for persons in the position of life occupied by the wife and her husband, the court may well infer that the wife had authority to bind the husband¹⁴. Where the wife executes a mortgage deed to secure the payment of money due on a promissory note from herself, and the husband afterwards acquiesces in the mortgage and so ratifies her action, she can be said to have been acting as her husband's agent to the best of her ability¹⁵. Where the wife is carrying on her own business she is liable for debts contracted in the course of her business and not the husband. The implication that the wife is impliedly carrying on the business as the agent of the husband is excluded by the Married Women's Property Act (III of 1874)¹⁶. Provision made by the husband for the supply of necessities to the wife rebuts the presumption of implied authority to pledge the husband's credit for necessities¹⁷. A Hindu woman is not justified in leaving her husband on his marrying a second time. Accordingly a wife who has voluntarily separated from her husband on the above ground is liable personally for a debt contracted by her even for necessities. She has no authority to pledge her husband's credit¹⁸. No liability of the husband can arise when the wife believes him to be dead and borrows the money in her own right¹⁹. A wife having the custody of a child and living properly and legally separated from her husband has authority to pledge her husband's credit for the reasonable expenses of providing for the child²⁰.

If an appearance of authority to pledge the husband's credit is once, in fact, created by the husband's acts, or by his assent to the acts of the wife, then as between the husband and wife's creditor, it cannot be got rid of by

10 *Debenham v. Mellon*, 6 AC 24, 31, cited in *Robinson v. Rigg*, 34 ALJ 50.

11 *Phillipson v. Hayter*, LR 6 CP 38; *Cooper v. Lloyd*, 6 CBNS 519, 521 : (1843-60) All ER Rep 923.

12 *Kanhaya v. Indar*, 1947 N 84.

13 *Girdhari Lal v. Crawford*, 9 A 147, fold in *Robinson v. Rigg*, 34 ALJ 50.

14 *Baboolal v. Purcell*, 34 ALJ 1280

15 *Maung Sin v. Po*, 12 IC 28.

16 *Allumuddy v. Braham*, 4 C 140.

17 *Mahomed v. Robinson*, 30 M 543, *Morel Bros. v. Westmorland*, (1903) 1 KB 64 : (1900-03) All ER Rep 397, affmd. in (1904) AC 11 reld. to; see *Ma Byaw v. Tun*, 1934 R 341.

18 *Nathubhai v. Jawher Baiji*, 1 B 121.

19 *Pusi v. Mahadeo*, 3 A 122.

20 *Debenham v. Mellon*, 6 AC 24, 30.

a mere understanding between the husband and the wife, but the creditor is entitled to notice of revocation of the wife's authority to pledge her husband's credit any longer¹. Thus, where a lady had her husband's express authority to act as his agent, and did so act, and there was no misrepresentation on the wife's part, the husband was held liable². The liability of a person who cohabits a woman and allows her to be supplied with goods on his credit continues until tradespeople have been informed of the termination of such connection³, or until his death when his executor will not be liable⁴. "The authority of a wife to pledge the credit of her husband is a delegated, not an inherent authority. If she bind him, she binds him only as agent. This is a well-established doctrine. If she leaves him without cause and without consent she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compel her to leave his home, he is bound to maintain her elsewhere"⁵. In *Manby v. Scott*⁶, it is laid down that, as a general rule, where a plaintiff seeks to charge a husband on a contract made by his wife, the question is whether the wife had authority, express or implied, to make the contract; the wife cannot make a contract binding on her husband unless she gives her authority as his agent so to do. The wife has no authority to make a contract binding on her husband for necessities suitable to his estate and degree against his will and contrary to his order to her, although without notice of such order to tradesman⁷. The principle that a liability incurred by a Burmese Buddhist husband for the joint purpose of himself and his wife binds his wife, based upon the presumption that the wife has consented to the incurring of such liability, cannot be of avail where the wife has expressly withheld her consent⁸. A father is bound to maintain the child, however large the fortune of the latter might be. But a widow is under no legal liability to maintain her child⁹. The law does not throw on the mother, while the father is alive, the legal obligation of maintaining or providing for the children¹⁰. There is no presumption that a husband has authority to act on behalf of his wife to sell her property. A contract of sale executed by the husband in regard to his wife's land cannot bind the wife unless it is proved that the husband had the authority express or implied to act on behalf of his wife¹¹.

188. Extent of agent's authority.—An agent having an authority to do an act has authority to do every lawful thing

1 *Bazeley v. Forder*, LR 3 QB 559.

2 *Paquin Ltd. v. Beauclerk*, 1906 AC 148 : (1904-07) All ER Rep 729.

3 *Ryan v. Sams*, 17 LJQB 271.

4 *Blades v. Free*, 9 B & C 167, see *Smout v. Ilbrey*, 12 LJ Ex 357.

5 *Wilson v. Glossop*, 20 QBD 354; (1886-90) All ER Rep 1058, citing *Eastland v. Burchell*, 3 QBD 432 : (1874-80) All ER Rep 849.

6 2 Sm LC 417.

7 *Jolly v. Rees*, 33 LJCP 177.

8 *San Ya v. P. R. Firm*, 1936 R 396.

9 *Douglas v. Andrews*, 12 Beav. 310.

10 *Hodgens v. Hodgens*, 4 Cl & F 323, 374.

11 *Phuljhari Devi v. Mithai Lal*, AIR 1971 All 494, 499.

which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations

(a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

1. **Extent of agent's authority.**—Where a person enters into a contract in writing, describing himself as an agent and naming his principal, the principal is bound if the agent had authority to enter into the contract on his behalf¹². The extent of the agent's authority to bind the principal will clearly appear from the following observation in *Dhanpat Rae v. Allahabad Bank*¹³. An agent has implied authority to pledge the credit of his principal for what is necessary for the successful management of the business and, as usual, an agent in charge of a business has implied authority to bind his principal by raising a loan for the purposes thereof, only if his act is necessary or is usual in the management of the particular business or is justified by an emergency. Further, if the implied authority of an agent to raise a loan is not established, but it is proved that the sum borrowed, or a portion thereof, has been applied for the benefit of the business, the creditor is entitled to be reimbursed by the principal to the extent he has benefited¹⁴. It is only when the contract cannot be enforced against the principal on the ground of necessity that the lender has to fall back on the equitable theory of "unjust enrichment" (i.e. benefit). If the money be applied for the principal's benefit, he is liable jointly and severally with the agent to restore the amount of the value of such money. The question of necessity and the question of benefit should not be mixed up. The equitable rule is applicable in India. The claim can also be rested under S. 69 or S. 70. As the liability is joint and several, a decree against the agent is no bar to a decree against the principal¹⁵. It is within the authority of a manager of a mine to enter into a contract binding on the owner¹⁶. Where an agent borrows money and no attempt is made to justify the borrowing on the ground of 'necessity' or with reference to 'the usual course of business', the principal cannot be held liable on the footing that in borrowing the agent acted within the limits of his

12 *Downman v. Jones*, 14 LJQB 226.

13 98 IC 783.

14 *Heramba v. Kasi*, ICLJ 199; *Reversion Fund v. Maison Cosway Ltd.*, (1913) 1 KB 364; *Suppayya v. Dawood*, 32 IC 763.

15 *Goolab v. Miller*, (1938) 2 MLJ 688.

16 *Pacific Minerals v. S. M. Syndicate*, 1938 C 343.

authority¹⁷. If a creditor takes partnership money for the payment of a private debt due from one of the partners with a knowledge that the payment is made without the assent of the other partners, he becomes a party to the fraud on the other partners and cannot retain the money¹⁸. Where general authority by the agent to accept bills in the principal's name is proved, an admission of liability on a bill so accepted by the agent is confirmation of the general authority already proved¹⁹. An agent who has some interest in a property can maintain an action to protect that interest²⁰.

If instructions to an agent be ambiguous the principal will not be released from liability if the agent honestly and *bona fide* interprets the instructions in one way, though it is different from the sense the principal intended them to be understood¹. The modes in which any agency may be constituted is three-fold. It is either by writing, or it is by parol, or it is by mere employment. It may be laid down, as a general rule, that when the authority is general it will be construed liberally, but also that it must be construed according to the usual course of dealing in such matters. If the authority is ambiguous it is to be construed according to the course of trade in such matters; if it is unexpressed, it is to be ascertained by investigating what was the course of dealing which was pursued between the several parties to the transactions. Where an express authority is given, there is an implied authority combined with it to do all acts which may be necessary for the purpose of effecting the object for which the express authority is given. Where a parol authority is given it may be enlarged by parol, or even an additional authority super-added to it, by the employment of the parties known to and acquiesced in by them².

The general rule, that the act of an agent does not bind his principal unless it is within the authority given to him, is clear. There are however (i) cases where the agent has, by law, a general authority to bind his principal, though as between themselves there was no such authority, such as partners, masters of ships, managers of trading businesses; and (ii) cases where a special agent, without express authority, in fact might have an authority in law to bind his principal, e.g., where a principal holds out that the agent has such authority. Thus, if the servant or agent of a private individual, entrusted on one occasion to sell a horse, without authority from his master, takes upon himself to warrant the soundness of the animal, the master is not bound³. But if the servant of a horsedealer or even one who only occasionally assists him in his business, being employed to sell, gives a warranty, the principal is bound even though the agent or servant was expressly forbidden to

17 *Paboodem v. Miller*, 1938 M 966.

18 *Piercy v. Fynney*, LR 12 Eq 69.

19 *Llewellyn v. Winckworth*, 14 LJ Ex 329.

20 *Subodh v. P. of Bihar*, 1950 Pat 222.

1 *Ireland v. Livingston*, LR 5 HL 395, cited in *Seethalakshmi v. Co-operative Society*, 70 IC 636.

2 *Pole v. Leask*, 28 Beav. 562, 574 : (1861-73) All ER Rep 535.

3 *Brady v. Todd*, 30 LJCP 223, *referred to in Payne v. Leaconfield*, 51 LJQB 642.

warrant⁴. So also if the sale be at a fair, the servant entrusted by his master with the sale of a horse has implied authority to give a warranty to the purchaser⁵.

The statement of a person having authority to represent another on the basis of a power of attorney is the statement of an agent in course of business and admissible in a criminal case against the principal⁶.

In order to amount to an implied warranty it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted⁷.

An agent's authority is presumptively to settle in cash, in the absence of express authority to the contrary effect or of an authority by custom or usage⁸. A clerk authorised to receive payment in cash over the counter only cannot receive it elsewhere, nor can he receive payment by cheque⁹. An agent cannot receive money on account of his principal by means of a settlement of account between himself and a debtor¹⁰. An agent authorised to receive money from a debtor of the principal has no authority to accept as payment a cheque of his own, thereby release the debtor from liability to the other contracting parties. The debtor is not discharged by such payment from the debt to the agent's principal¹¹. "That an agent authorised to sell has as a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority"¹², unless the agent had the authority, actual or ostensible or customary, to receive payment¹³. An agent, if he be not a creditor of his principal, must receive what is due to his principal, in cash; if the agent be himself a creditor of the principal, then the balance to be made over to the principal must be received in cash¹⁴. There is no authority for an agent employed to receive money on behalf of his principal to take anything but cash, unless it is in accordance with the ordinary course of business to receive a cheque¹⁵, or a bill of exchange¹⁶. As the agent of the decreeholder, the pleader is entitled to appropriate the payment by the judgment debtor towards satisfaction of the outstanding debt¹⁷. An agent to collect bills has no authority to waive a part of the claim¹⁸.

4 *Howard v. Sheward*, LR 2 CP 148; *Baldry v. Bates*, 52 LT 620.

5 *Brooks v. Hassall*, 49 LT 569.

6 *R. K. Dalmia v. Delhi Administration*, AIR 1962 SC 1821.

7 *Comptoir Commercial Anversois v. Power*, (1920) 1 KB 868, 899 : (1918-19) All ER Rep 661.

8 *Gokalchand v. Nandram*, 43 CWN 87 PC.

9 *Kaye v. Brett*, 19 LJ Ex 346.

10 *Pape v. Westacott*, (1894) 1 QB 272, refing. to *Pearson v. Scott*, 9 Ch D 198.

11 *Underwood v. Nicholls*, 25 LJCP 79.

12 *Drakeford v. Piercy*, 7 B & S 515, 522; but see *Howard v. Chapman*, 4 C & P 508.

13 *Butwick v. Grant*, (1924) 2 KB 483 : (1924) All ER Rep 274, refd. in *Krishna v. Subba*, 70 MLJ 570.

14 *Barker v. Greenwood*, 2 Y & C Ex 414.

15 *Pape v. Westacott*, (1894) 1 QB 272.

16 *Williams v. Evans*, LR 1 QB 352.

17 *Bidhu v. Ahmed*, 42 CWN 1263.

18 *Bank of Scotland v. Dominion Bank*, 1891 AC 592.

As between partners and the outside world, each partner is the unlimited agent of every other in every matter connected with the partnership business or which he represents as partnership business, and not being in its nature beyond the scope of the partnership¹⁹. In order that one member of a partnership may bind another by drawing or accepting a bill he must have authority either express or implied by law to do so²⁰. A firm is liable for repayment of the sum of money received by one of its partners¹. Payment to one of two partners of a partnership debt is a good payment². But a firm is not liable for an order placed in its name by a person who has no actual authority to give the order. When there is no holding out and no authority proved, there can be no liability³. An agent financing and generally looking after a law suit carried on by a *pardanashin* lady is not authorised to compromise the suit on her behalf. An agent authorised to do a certain act cannot be held to be authorised to do another act in connection with the same business. Any person seeking to bind a *pardanashin* lady by the act of her agent must give strict proof of such agency⁴. A mere authority to sell⁵ does not carry with it an implied authority to receive the purchase money for the land on behalf of the principal. There is a substantial difference between an authority to sell and authority to find a purchaser⁶. An authority given to an agent to act as agent "in and about" a purchase⁷, or to "treat and view"⁸, or to find a purchaser⁹ of landed property does not authorise him to enter into a contract for the sale of the estate. But an agent having authority to sell can do what is usually done in the course of conducting a sale¹⁰. Authority given to an agent to negotiate a sale for a fixed price entitles him to enter into contract for sale¹¹.

If *P* the owner of, say a motor car, puts *Q* in possession of the car authorising *Q* to sell it with knowledge that *Q* would probably sell it as principal and if *Q* acting on that mandate holds himself out to *D* as principal and sells the car to *D* as apparent principal, *D* obtains a good title to the car¹².

Instructions to a solicitor to prepare a formal document of sale of an estate does not authorise him to enter into a binding contract of sale¹³. But instructions given to an agent to sell for the owner his house, and an agreement to pay him a commission, are an authority to the agent to make a

19 *Baird's Case*, LR 5 Ch 725.

20 *Ram Chandra v. Kasem*, 28 CWN 824, *Holme v. Hammond*, LR 7 Ex 218, 233 reff. to; the law laid down in *Watteau v. Fenwick*, (1893) 1 QB 349 : (1891-94) All ER Rep 897 as to the liability of a dormant partner doubted.

1 *St. Aubyn v. Smart*, LR 3 Ch. 646.

2 *Porter v. Taylor*, 6 M & S 156 : 105 ER 1201.

3 *Gobindram v. Partapsing*, 169 IC 423.

4 *Tarubala v. Sourendra*, 41 CLJ 213, 220.

5 *Narasimhulu v. Sundara*, 20 MLJ 479, 482.

6 *Durga v. Rajendra*, 36 CLJ 467, see cases reff. to; *Purna v. Indra*, 49 C 389.

7 *Value of Neath Colliery v. Furness*, 45 LJ Ch 276.

8 *Godwin v. Brind*, LR 9 CP 299 n.

9 *Hamer v. Sharp*, LR 19 Eq. 108.

10 *Goverdhan v. Abdul*, 1942 M 634.

11 *Appa v. Gopal*, 1946 M 42; see *Ahmed v. Mitter*, 1950 SC 15.

12 *Llods and Scottish Finance Ltd. v. Williamson*, (1965) 1 WLR 404 CA.

13 *Smith v. Webster*, 3 Ch D 49.

binding contract including an authority to sign an agreement for sale¹⁴. The mere employment by an owner of an estate agent to dispose of a house confers no authority to make a contract. The agent is solely employed to find persons ready to negotiate with the owner; but, if the agent is definitely instructed to sell at a defined price, these instructions involve authority to make a binding contract and to sign an agreement. An agent authorised to sign an open contract cannot sign a contract containing a special condition as to title¹⁵. A power to a land agent "to manage and superintend estate" authorises him on behalf of his principal to grant a lease for 99 years according to the custom in the neighbourhood¹⁶. An agent employed to let or sell a house has authority to describe the property truly, to represent its actual situation, and, if he think fit, to represent its value¹⁷. A power to purchase, sell, transfer, certain shares on the plaintiff's behalf does not validate a transaction of sale partly for money and partly for a consideration to resell¹⁸. An agent authorised to make, endorse and negotiate bills of exchange is not authorised to make speculative purchases of shares¹⁹. An agent authorised to receive money and give receipt therefor has authority to accept the money in payment of a particular instalment or to waive the default in paying an instalment²⁰. A power to borrow does not necessarily imply a power to mortgage the property¹. An agent empowered to conduct a suit in any manner he may deem fit, even to the extent of withdrawing it, must be deemed to have possessed a power to bind his principal by an agreement to abide by a special oath entered into with the opposite party². Authority to an agent "to resort to any other procedure allowed by law for recovering and enforcing payment" does not authorise the agent to assign a decree passed in favour of the principal³. A broker given authority to buy or sell, in the absence of a special local custom to the contrary, cannot defer carrying out the order until he has communicated the rate of the day to his principal and has received his sanction to it⁴.

Sections 187 and 188 no doubt authorise a manager to borrow if necessary; but such general provisions are subject to modification in particular cases with the result that the manager will not be allowed to borrow⁵. A power to purchase goods includes the power to pay for them but not the power to borrow nor also the power to receive money on deposit⁶. The degree of authority of the agent is to be judged by the nature of the concern

14 *Rosenbaum v. Belson*, (1900) 2 Ch 267 : (1900-03) All ER Rep 670.

15 *Keen v. Mear*, (1902) 2 Ch 574 : (1920) All ER Rep 147, see cases reld. to.

16 *Peers v. Sneyd*, 17 Beav. 151.

17 *Mullens v. Miller*, 22 Ch D 194.

18 *Jumma v. Eckford*, 9 C 1.

19 *Kadiresan v. Ramanathan*, 102 IC 561.

20 *Manohar v. Sakina*, 37 IC 442.

1 *Narayan v. Chandrabhan*, 48 IC 959.

2 *Wasiuzzaman v. Faiza Bibi*, 38 A 131, fold in *Jhabbu v. Zahid*, 53 IC 453.

3 *Govardhan v. F. D. T. Co.*, 1939 M 543.

4 *Vishinji v. Jasraj*, 50 IC 146.

5 *Ferguson v. Boid*, 33 C 343.

6 *Vijiathammal v. Kadir*, 165 IC 831.

and the mode in which it has been carried on'. This exposition of the law is in substantial accord with the provisions of the section. An agent has implied authority to pledge the credit of his principal for what is necessary to the successful management of the business and is usual. The power to manage a business may imply an authority to raise money, when the raising of the money is necessary for the proper carrying on of the business affairs which are to be administered by the agent. It must be distinctly found that the act of agent was necessary for the purpose of the business or was usual in the management or was justified by an emergency⁷. A general authority to carry on the business of a Chetty banker and money-lender does not include a power to make the principal a surety for another's loan and does not include a power to borrow money in the principal's name for another, nor to sign promissory notes for the principal jointly with another, unless these can be proved to be the necessary incidents of the banking business⁸. Where the principal is not carrying on any business which may involve the executing or accepting of a promissory note the agent has no authority to execute one on behalf of the principal¹⁰. Under the section an agent having an authority to carry on a business has authority to do everything necessary for the purpose or usually done in the course of conducting such business¹¹. Where an agent is authorised to borrow money for the purpose of carrying on a business, the lender is not bound to inquire whether in the particular case an emergency has arisen necessitating the raising of the loan¹². If the borrowing be not for 'necessity', or in the usual course of business, the principal is not liable. In *Montaignac v. Shitta*¹³, it was conceded that the agent did have the power to borrow. If necessity for the loan is made out the principal is liable¹⁴; if it cannot be made out the principal is not liable¹⁵. A clerk considering himself and generally regarded as the local manager of the plaintiff firm for dealing with the firm's land has authority to let out a portion thereof¹⁶. A mere power to appoint a general manager does not authorise the directors to transfer to him the power to purchase shares, which power is expressly given to the directors themselves¹⁷. No doubt, under the general law of agency an agent is not presumed to have authority to bind his principal by a reference to arbitration, but where there is a custom judicially recognised among European firms in Karachi not to import goods from Europe except on an indent containing an agreement to submit disputes to arbitration, an agent dealing with such

7 *Ricketts v. Bennett*, 4 CB 686 refd. to.

8 *Heramba v. Kasi*, 1 CLJ 199.

9 *Ramanathan v. Bank of Bengal*, 23 IC 516.

10 *Ram v. Banwari*, 1938 L 41.

11 *Dhanpat v. Allahabad Bank*, 98 IC 783; but see *Lakhajee v. Sein Dass*, 1940 R 97.

12 *Montaignac v. Shitta*, 15 AQ 357.

13 *Pabooden v. Miller*, 1938 M 966.

14 15 AC 357; *Naba v. Jagannath*, 1934 P 435.

15 *Goolab v. Miller*, (1938) 2 MLJ 688.

16 *R. M. S. Firm v. Ba*, 99 IC 748.

17 *Cartmell's Case*, LR 9 Ch 691, 695.

firms has authority conferred on him by this section to refer disputes to arbitration¹⁸. An agent authorised to sell or mortgage the principal's interest and conduct suit has no authority to execute a mortgage containing a personal covenant to repay¹⁹.

A power of attorney authorising an agent to demand or sue for payment does not authorise him to endorse bills for his principal²⁰. But an agent under a general power of attorney has been held to have authority to enter into a contract of guarantee which is binding on his principals¹. Admissions made by a government are admissions made by the agents of the Government².

In every case where an Act requires a signature, it is a pure question of construction of the terms of the particular Act whether its words are satisfied by signature by the agent. In some cases, under some Acts, the courts have held personal signature to be necessary. In other cases signature by an agent has been held sufficient³. Authority of a clerk to endorse bills may be presumed from previous dealings, such as drawing or endorsing cheques in the past⁴. A servant who buys goods on credit on behalf of his master makes the master liable even though in one instant he misappropriates the goods⁵. But in order to fix the principal for an order given by a person purporting to be his agent, an actual or ostensible authority to contract for the principal, or ratification, must be proved. A servant has no ostensible authority to pledge his master's credit nor does such authority follow from the relation of master and servant⁶.

When an agent enters into a contract not according to the terms of his authority the principal is not bound by the contract. But if by custom the omitted terms be incorporated in the contract it is binding⁷. A person authorised to sell a salvage in a particular area has no authority to sell it in a different area⁸. A charterer's agent has no authority to bind his principal substituting a totally different contract (*e.g.*, another voyage) from that contained in the charterparty⁹. A wharfinger is not bound by a receipt given by his agent for goods which have not been received, for it is not within the scope of the agent's authority in the course of his employment to grant such a receipt¹⁰. A principal is not civilly liable for the acts of his agent unless

18 *Shimwell v. Baniram*, 1 IC 937; *People's Bank v. Lekhu*, 192 IC 758.

19 *V. E. R. Firm v. U. Ba*, 134 IC 216.

20 *Murray v. E. I. Co.*, 5 B & Ald 204: (1814-23) All ER Rep 227.

1 *Narendra v. Bimala*, 42 CWN 718.

2 *S. of S. v. District Board*, 1939 C 758.

3 *Re Whitley*, 32 Ch D 337, 340 cited in *Kureshi v. Argus*, 9 R 323.

4 *Prescott v. Flinn*, 9 Bing 19.

5 *Summers v Solomon*, 26 LJQB 301.

6 *Wright v. Glyn*, (1902) 1 KB 745.

7 *Heyworth v. Knight*, 33 LJCP 298: 144 ER 120.

8 *Banerjee v. Simonds*, 1947 C 307.

9 *Sickens v. Irving*, 29 LJCP 25.

10 *Coleman v. Riches*, 24 LJCP 125.

the agent acts within the scope of his authority ; but the principal may be criminally liable though the agent has acted beyond the scope of his authority¹¹. The manager of the Court of Wards is not authorised to pay a time-barred debt¹².

2. Power of attorney.—A power of attorney is to be strictly construed. When challenged as being in excess of the authority conferred by the power, it is necessary to show that the authority in question is to be found in the four corners of the instrument either in express terms or by necessary implication¹³. In order to determine what powers a power of attorney purports to grant the whole must be read together. General words may be restricted by other words in the power. When a person dealing with an agent does not care to ask for the power of attorney of the agent, the principal cannot be bound by the transaction if it is in excess of the agent's authority. Power of attorney conferring authority to sell confers a power to clarify a title and to settle disputes¹⁴. General words following special powers are to be construed as limited to what is necessary for the proper exercise of the special powers¹⁵. The operative part of a power of attorney is controlled by the recitals¹⁶. If it be expressly stated in the power of attorney that the agent will have no power to borrow money, he can have no authority to bind the principal by borrowing¹⁷. A power conferring authority to borrow must be strictly construed. Such an authority cannot be construed into a power by the agent for giving a mortgage¹⁸. An agent empowered to borrow money only for necessity does not bind the principal by a loan not proved to have been contracted for necessity¹⁹. An agent authorised to obtain an extension of time and postponement of an impending judicial sale has authority to do every lawful thing necessary in order to perform the act which he was expressly authorised to do²⁰. But a power of attorney authorising a person to execute a deed of sale, and to admit execution thereof before the registering officer, does not authorise him to enter into an agreement for the sale of the property and the execution of a conveyance¹. Unless there is an express power given to the agent to enter into contracts of guarantee or to execute negotiable instruments, it rests upon the person lending the money to show that the agent had in fact authority to enter into such a transaction². A power of

11 *Parkes v. Prescott*, LR 4 Ex 169, 182.

12 *Anand v. Dy. Commsnr*, 185 IC 290.

13 *Bryant v. Quebeck Bank*, 1893 AC 170, 177, cited in *Narayan v. Chandrabhan*, 48 IC 959; *Vijiathammal v. Kadir*, 165 IC 831; *Ezekiel v. Carew*, 1938 C 423; *Pabooden v. Miller*, 1938 M 966.

14 *U. P. Govt. v. C. M. T. A.*, 1948 O 54.

15 *Prince Line v. Trustees*, 1950 B 130.

16 *Danby v. Coutts & Co.*, 29 Ch D 500.

17 *Jagmohan v. Sampatlal*, 135 IC 401.

18 *Solema Bibi v. Mahammad*, 104 IC 833, 839.

19 *Muhamdi v. Durga*, 40 IC 452.

20 *Ghasiram v. Rajamohan*, 6 CLJ 639.

1 *Janki Pershad v. Yahia*, 13 IC 637, distigd. in *Narendra v. Bimala*, 42 CWN 718.

2 *Ramanathan v. Bank of Bengal*, 23 IC 516.

attorney authorising the agent to enter into any bonds, *etc.*, or any other document purporting to create a charge upon the principal's property, authorises the agent to enter into a contract of guarantee and execute a suretyship bond³. Three brothers gave a special power of attorney to *A* authorising him to engage a legal practitioner, conduct the suit, present applications in court, it was further recited that everything done by him would be binding on the brothers. *A* did not have power to compromise⁴. Where a plaintiff by a power of attorney authorised an agent to look after her immovable property, to collect rents, lease out lands, *etc.*, but prohibited him from mortgaging the immovable property, and the agent pawned some ornaments of the principal which he had in his hands, the agent had no authority to deal with movable property⁵. Under a power of attorney by a firm to its managing agent to transact all its affairs, the latter has authority to execute a lease for the firm⁶. An agent cannot bind the principal by acts to a larger extent than he is empowered to do under the power of attorney. Any act of the agent done in excess of such power will not bind the principal⁷.

A power of attorney authorising the holder to dispose of certain property does not confer on him a power to mortgage the property⁸, or to pledge it⁹. A power of attorney authorising the agent to collect rents does not empower him to create a mortgage¹⁰. Where a merchant during his absence employs an agent to carry on his business with power to purchase and do certain particular things in connection with such purchases, the power does not confer on the agent the general power of borrowing, therefore, the principal is not liable for the amount borrowed by agent¹¹. An agent, authorised to sue for and recover all debts due and to give discharges for sums received, is not authorised to endorse bills for his principal¹². A power of attorney authorising the attorney *inter alia* "to commence and carry on, or to defend, at law or in equity, all actions, suits or other proceedings in which I or my ships or other personal estate may be in anywise concerned" authorises the attorney to sign on behalf of his principal a bankruptcy petition against the debtor of the principal¹³. A power of attorney authorising an agent "to conduct litigation" empowers him to appoint a pleader for the purpose of instituting an appeal¹⁴. A power of attorney authorising an agent "to adjust" a matter does not include a power to refer the matter to arbitration¹⁵. A power of

3 *Narendra v. Bimala*, 42 CWN 718.

4 *Bishna v. Rattani*, 13 IC 92.

5 *Shankar v. Lakshmibai*, 30 Bom LR 470.

6 *Bhagwan v. Chettyar*, 1933 R 385.

7 *Malaiperumal v. Arunachalla*, 41 IC 224.

8 *Malukchand v. Shan Moghan*, 14 B 592.

9 *Jonmenjoy v. Watson*, 9 AC 561; *Bank of Bengal v. Fagan*, 5 MIA 127.

10 *Krishna v. Sundara*, 1932 M 381.

11 *Jacobs v. Morris*, (1902) 1 Ch 816 : 71 LJ Ch 363.

12 *Murray v. East India Co.*, 5 B & Ald 204 : (1814-23) All ER Rep 227.

13 *Re Wallace*, 14 QBD 22.

14 *Court of Wards v. Gopal*, 13 Lah 256.

15 *Rama v. Kumara*, 1940 M 650.

attorney is in general revocable in its nature; but where a power is part of a security for a debt, it is irrevocable until the debt is repaid notwithstanding the death of the debtor¹⁶. A power of attorney executed by a person while of unsound mind is a nullity, any transaction purported to be done under the power is also a nullity¹⁷. A general power of attorney is one whereby the agent's authorisation extends to a class of business or employments, a special power is one where the power is restricted to the doing of all necessary acts in the accomplishment of one particular purpose, e.g., the realisation of a particular debt¹⁸.

3. Authority of legal practitioners.—The relationship between counsel and his client is not that of an agent and principal. The duty of counsel is to advise his client out of court and to act for him in court, until his authority is withdrawn and this withdrawal is made known to the other side, he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client, e.g., he can assent to a compromise upon certain conditions and terms¹⁹. Counsel in India have the same implied authority to compromise an action as have counsel in the English Courts. This authority is implied from the employment as counsel. It may be withdrawn or limited by the client, in such a case the authority is destroyed or restricted²⁰. No power of attorney is necessary to empower a counsel to agree to a valid and binding compromise¹. Where the compromise extends to collateral matters, outside the scope of the particular case in which the counsel is engaged, in order to bind the client it must be shown that the counsel had a special authority to compromise. If counsel under a misapprehension of his client's instructions believing himself to have authority, acts in fact without it, he cannot bind his client². A compromise of a case notwithstanding the express prohibition of the client has been set aside³. In *Askaran v. E. I. Ry.*⁴, it has been pointed out that an advocate (whether a counsel, a vakil, or attorney) has authority to compromise a suit if he assents to the arrangement in court, but his client is not bound by the act or admission of the advocate out of court. This distinction has not been adopted in subsequent cases⁵. A counsel has no authority to refer an action against the

16 *Abbott v. Straten*, 3 Jo & L 60.

17 *Daily Telegraph Co. v. Mc. Laughlin*, 1904 AC 776.

18 *Venkataramana v. Narasinga*, 38 M 134, refd. to in *Vardaji v. Chandrappa*, 41 B 40.

19 *Matthews v. Munster*, 20 QBD 141: (1886-90) All ER Rep 251, cited in *Jang Bahadur v. Shankar*, 13 A 272.

20 *Sheonandan v. Abdul*, 39 CWN 1185 PC.

1 *Ramzan v. Gopal*, 17 Lah 456.

2 *Nundo Lal v. Nistarini*, 27 C 428, 438, 448, *Swinfen v. Swinfen*, 1 CBNS 364 refd. to; *Muthia v. Muthu*, 50 M 786, cited in *Bashiran v. Mohammad*, 33 ALJ 953; *Swinfen v. Chelmsford*, 5 H & N 890, 922.

3 *Carrison v. Rodrigues*, 13 C 115.

4 52 C 386.

5 *Johurmull v. Kedarnath*, 55 C 130; *Sourendra v. Tarubala*, 57 IA 133, authority of counsel to effect a compromise reviewed.

wishes of his client or upon terms different from those which his client has authorised. If he does so, the settlement may be set aside⁶. As has been said, advocates have ostensible authority to compromise a suit. But in cases where they took express instructions from their clients, and it was doubtful whether the clients appreciated that they consented to a compromise in the same sense in which it was appreciated by the advocates, it was open to the court to refuse its assistance for the purpose of implementing the compromise if in its discretion it thought it right and proper to do so⁷. When a consent decree is set aside on the ground that the decree was passed on a compromise in excess of the authority of the pleaders of the parties the effect is to revive the original suit⁸. Unless the authority of a counsel is limited, a compromise, entered into by him in the absence of the client and without his consent, is binding on the client⁹. It has been held that counsel's consent to a decree is without authority if it be given without consulting the client when the client is present in the court even though the counsel is unaware of the fact¹⁰. A compromise made by a counsel, duly authorised by a *vakalatnama* to enter into a compromise on behalf of his client, will be binding on the client even if the counsel acted under the instructions of a third person¹¹. A counsel has authority to confess judgment, withdraw or compromise or refer to arbitration the suit in which he is instructed, if his doing so is for the client's advantage, though he has no express authority from his client. Admissions in court by counsel on matters of fact relevant to the issue bind the client but not admissions on questions of law¹². Counsel has apparent authority to compromise in all matters connected with the action and not merely collateral to it if he acts within his apparent authority, and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel. Before a consent order has been drawn up and perfected, the consent given by the counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension¹³. Parties are bound by the admission of counsel unless he has been induced or misled by some circumstances to make a statement under a mistake. Where therefore counsel at the first hearing of an appeal abandons certain points he cannot be allowed to go behind that admission¹⁴. Where counsel had given an undertaking that no appeal would be filed to the Privy Council, an appeal in breach of the undertaking was declared to

6 *Chuni Lal v. Hira Lal*, 32 CWN 44, *Neale v. Lennox*, 1902 AC 465 (1900-03) All ER Rep 622, reld. to; *Sourendra v. Tarubala*, 51 CLJ 309.

7 *Ma Ahma v. Ma Khin*, 13 R 319.

8 *Raj Kumar v. Hara Krishna*, 10 IC 355.

9 *Sen v. Chuni*, 83 IC 611.

10 *Ghasiram v. Haribux*, 34 CWN 210.

11 *Dayal v. Hara*, 108 IC 262.

12 *Bashiran v. Muhammad*, 158 IC 97.

13 *Nilmoni v. Kedar*, 67 IC 96.

14 *Doddava v. Yellawa*, 70 IC 417.

be not maintainable¹⁵. "If a client is in court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him and acquaint the other side with this, he must be taken to have agreed to the course proposed"¹⁶. If a party is, by the fraudulent action of his vakil or other legal adviser, committed to a compromise to which he did not wish to consent, his proper action is to get the decree set aside as having been obtained by fraud¹⁷.

"An attorney retained to conduct a case is entitled, in the exercise of his discretion, to enter into a compromise, if he does so reasonably, skilfully and *bona fide*, provided always that his client has given him no express direction to the contrary"¹⁸. This authority, it seems, extends to a managing clerk having the general conduct of the attorney's business¹⁹. An admission by an attorney unless satisfactorily explained away furnishes cogent evidence against the client²⁰. In the absence of a specific authority a pleader cannot bind his client by a compromise¹. Generally speaking, a party is not bound by a pleader's², or a muktear's³, admission on a pure question of law.

4. Contracts with Corporations.—"The court cannot recognise the rights of individuals interested in the corporation ; but must look to the rights and liabilities of the corporation itself⁴. Directors are merely the agents of the company. The company itself cannot act in its own person, for it has no person ; it can only act through directors⁵. When the seal of a corporation is affixed to a document it is *ex facie* regular in all respects and *prima facie* presumed to have been properly sealed, the onus of disproving it lies on the person challenging the execution of the document⁶. A corporation is not bound where one of its officers improperly affixes its seal without its authority⁷. A company is bound in a matter *intra vires* by the unanimous agreement of its members even though acted without authority or without observing the necessary formalities⁸. A contract which is *ultra vires* the company, therefore void, cannot be ratified even by the unanimous assent of all the members of the corporation⁹. Thus, directors accepting a bill on behalf of a company

15 *Amir v. Inderjit*, 14 MLA 203 ; *Re Union Sugar Mills*, 127 IC 428, 433.

16 *Matthews v. Munster*, 20 QBD 141 : (1886-90) All ER Rep 251, cited in *Ghasiram v. Haribux*, 59 C 31.

17 *Rama v. Rama*, 163 IC 161.

18 *Fray v. Voules*, 1 E & E 839.

19 *Prestwich v. Poley*, 18 CBNS 806.

20 *Ketokey v. Sarat*, 20 CWN 995 ; *Chandra v. Narpat*, 34 IA 27.

1 *Jagapati v. Ekamvara*, 21 M 274 ; *Basangowda v. Churchigirigowda*, 34 B 408.

2 *Narayan v. Venkatacharya*, 28 B 408.

3 *Nazo v. Hassan*, 144 IC 610.

4 *Edwards v. G. I. Ry.*, 1 My & Cr 650, cited in *Hawkes v. E. C. Ry.*, 1 G M & G 737, 754.

5 *Ferguson v. Wilson*, LR 2 Ch 77, 89.

6 *Re Barned's Banking Co.*, LR 3 Ch 105, 116.

7 *Staple of England v. Bank of England*, 21 QBD 160.

8 *Re Empress Engineering Works*, (1920) 1 Ch 466 ; *Howard v. Rowatt's Wharf*, (1896) 2 Ch 93.

9 *Ashbury Ry. Co. v. Riche*, LR 7 HL 653.

are liable when the company, under the terms of its incorporation, has no power to accept bills¹⁰. Directors have been held personally liable for a loan raised when the limit of borrowing is exceeded and when the company derives no benefit from the loan¹¹. Persons dealing with a company, and knowing its internal regulations, are not affected with notice of irregularity in its acts or conduct¹². Where a person has been induced to become a shareholder by fraudulent misrepresentation, he is entitled to have the contract rescinded; but if he does not choose to do so, he cannot evade his liability as a shareholder, *e.g.*, if the company be wound up¹³. Where under the articles of association a company could not start into business until 3,000 shares have been subscribed for, but the directors entered into contracts before this number of shares was subscribed, *held*, the directors might contract in their own names, they could not contract as directors of the company¹⁴. A creditor is not bound to concern himself with what is called the indoor management of the company but is bound to concern himself with the external position as disclosed by the regulations. Anyone dealing with a company, therefore, is fixed with notice of the powers of the company under its articles and of the modification in those powers created by any special resolution which has been imposed. If the directors of a company enter into a contract which is not binding upon the company, the latter in law is not liable on the contract; but in equity where by any wrongful or unauthorised act of an agent the money or property of a third person comes into the hands of the principal and is applied for his benefit, the principal is liable to restore the amount or value of such money or property¹⁵. "Persons contracting with a company and dealing in good faith may assume that the acts within the powers of the company have been properly and duly performed and are not bound to enquire whether the acts of internal management are regular"¹⁶. A company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; strangers dealing *bona fide* with such persons have a right to assume that they have been duly appointed. When the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bona fide* without notice of the irregularity in his appointment¹⁷.

When there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of the association, then those dealing with them externally are not affected by any

10 *West London C. Bank v. Kitson*, 13 QBD 360.

11 *Chapleo v. B. P. Building Society*, 6 QBD 696.

12 *County of Gloucester Bank v. Rudry Merthyr Colliery*, (1895) 1 Ch 629, 633; (1895-99) All ER Rep 847.

13 *Re Hull & County Bank*, 15 Ch D 507.

14 *Pierce v. Jersey Water Works Ltd.*, LR 5 Ex 209.

15 *National Coal Co. v. Gyan* 45 CLJ 96.

16 *Halshury*, Vol. 5 p. 302, cited in *Dehra Dun-Mussoorie E. T. Co. v. Jagmandar*, 29 ALJ 1038.

17 *Howard v. Rowatt's Wharf*, (1896) 2 Ch 93.

irregularity which may take place in the internal management of the company. But there are cases when persons are put upon inquiry as to the nature and extent of authority of an agent, *e.g.*, cashiers of a company ought to inquire into the authority of a director when they find a sole director endorsing cheques of the company and putting the money in his own private account¹⁸. "The general rule is that the master is answerable for every such wrong of his servant or agent as is committed in the course of his service"¹⁹. Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant²⁰. A master is liable for his servant's fraud perpetrated in the course of the master's business, whether the fraud was for the master's benefit or not, if it was committed by the servant in the course of his employment. There is no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment, and it is a question of fact in each case whether it was committed in the course of the employment. Where, therefore, the appellant company, general merchants, had expressly committed to servants of the respondent, a transport contractor, at his request, goods for carriage by road, and the servants stole the goods, and the evidence established that conversion took place in the course of their employment, the respondent was liable to the appellants for the value of the goods¹. But the principal is not liable in an action of deceit for the unauthorised or fraudulent act of a servant or agent, *e.g.*, a secretary of a company, committed, not for the general or special benefit of the principal, but for the servant's own private ends². A company will be answerable for misrepresentations made in a report of the directors sanctioned by a general meeting and the contract may be avoided by the person deceived³. A person induced to take shares by the false representations of the agent of a company is entitled to have the contract rescinded and to have a refund of the money paid to the company⁴, but not if he has been induced to take shares by the fraudulent misrepresentation of the secretary of the company⁵. It is not incumbent on the holder of a document, *e.g.*, a share or debenture, purporting to be issued by a company to inquire whether the persons pretending to sign as directors have been duly appointed⁶.

18 *Underwood Ltd. v. Bank of Liverpool*, (1924) 1 KB 775, 788 : (1924) All ER Rep 230, citing *Mahony v. East Holyford Mining Co.*, LR 7 HL 869, 894 : (1874-80) All ER Rep 427.

19 *Barwick v. English Joint Stock Bank*, LR 2 Ex 259 : (1861-73) All ER Rep 194, cited in *Houldsworth v. City of Glasgow Bank*, 5 AC 317; *Mackay v. Commercial Bank*, LR 5 PC 394.

20 *Citizen's Life Assce. Co. v. Brown*, 1904 AC 423 : (1904-07) All ER Rep 925.

1 *United Africa Co. Ltd. v. Saka Owoade*, (1955) 2 WLR 13 PC.

2 *British Mutual Banking Co. v. Charnwood Forest Ry.*, 18 QBD 714, 717 : (1886-90) All ER Rep 280, cited in *Uma v. Secy. of State*, 172 IC 567; *Oma v. S. of S.*, 1937 L 572.

3 *Ayre's Case*, 27 LJ Ch 579; *N. B. & Canada Ry. v. Conybeare*, 9 HLC 711, 725.

4 *Capel & Co. v. Sim's Compositions Co.*, 57 LJ Ch 713, 718; *Henderson v. Lacon*, LR 5 Eq 249.

5 *Diwan v. G. Sugar Mills*, 173 IC 165.

6 *Duck v. Tower Galvanising Co.*, (1901) 2 KB 314.

The rule that persons dealing with a company are not affected with notice of irregularity in the internal management of the company proceeds on a presumption that certain acts have been regularly done, so if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, then if there are circumstances which debar that person from relying on the *prima facie* presumption, it is clear that he cannot claim the benefit of the rule⁷. Directors of companies in issuing loans or debentures impliedly warrant their authority to do so, if such authority be lacking they are liable as for a breach of warranty and to refund the amount borrowed⁸, but where there are debentures which might have been available for the purposes of the contract, the directors are not personally liable⁹. Where a contract is entered into by an agent or directors on behalf of a company, without authority, it may be ratified by the company if it be *intra vires* the company¹⁰, but not if it is *ultra vires* the company¹¹. A forged document is a nullity and does not bind the company¹². When directors are authorised to borrow, persons lending money have a right to infer that the directors have duly complied with the conditions requisite for the purpose of borrowing and therefore the loans are binding on the company¹³. But no presumption can be made in favour of a lender when there is an express prohibition to borrow and no claim can be maintained by the lender against the company¹⁴. It is the duty of the directors to observe that the limitations on their powers are not exceeded¹⁵.

5. Reservation of authority of agent.—Secret limitation on the authority of the agent does not bind the other contracting party unless brought to his notice¹⁶. Where an agent is not authorised to receive payment for goods in other than crossed cheques, but this limitation is not known to a customer, and he *bona fide* pays in cash or its equivalent, the payment is valid¹⁷. An agent authorised to borrow money on the strength of securities entrusted to him by the principal with a limitation as to amount binds the principal for the larger amount that is borrowed. The lender is entitled to recover the whole sum advanced if he had no notice of the limitation on the agent's authority¹⁸. The principal is liable to a *bona fide* holder for

7 *Liggett v. Barclay's Bank*, (1928) 1 KB 48, 56 : (1927) All ER Rep 451.

8 *Weeks v. Propert*, LR 8 CP 427 ; *Firbank's Executors v. Humphreys*, 18 QBD 54.

9 *Elkington & Co. v. Hurter*, (1892) 2 Ch 452.

10 *Parker v. Reading*, (1926) 1 Ch 975, 984.

11 *Boschoek P. Co. v. Fuke*, (1906) 1 Ch 148.

12 *Kreditbank Cassel v. Schenkers*, (1927) 1 KB 826 : (1927) All ER Rep 421.

13 *Royal British Bank v. Turquand*, 25 LJQB 317 : (1843-60) All ER Rep 435, fold. in *Agar v. Athenaeum L. A. Society*, 27 LJCP 94 ; *Briffish T. H. Co. v. F. E. Bank*, (1932) 2 KB 176 : (1932) All ER Rep 448 ; *Pratt v. M. T. Ltd.*, 40 Bom LR 1109 PC.

14 *Pratt v. Sassoon*, 60 B 326.

15 *Fountain v. Carmarthen Ry. Co.*, LR 5 Eq 316, 322.

16 *Smethurst v. Taylor*, 14 LJ Ex 86 ; *Mathias v. K. A. Cooperative Bank*, (1938) 1 MLJ 241 ; *Chotey v. R. K. Ry.*, 1932 AJ 540 ; *Firm Ram v. Firm Mutsaddi*, 1942 A 170.

17 *International Sponge Importers v. Watt*, 1911 AC 279.

18 *Brocklesby v. Temperance P. B. Society*, 1895 AC 173 ; *Lloyd's Bank v. Cooke*, (1907) 1 KB 794.

value where he signs a promissory note in blank and the agent authorised to fill it in does so for an amount in excess of his authority¹⁹. But it is of the very essence of the liability of a person signing a blank instrument that it should have been handed over to the agent for the purpose of being used as a negotiable instrument. In the absence of a delivery of notes to an agent with the intention that they shall be negotiated, or, at any rate, that the agent shall have power to negotiate them, the signer is not responsible even to a *bona fide* holder for value²⁰. It is well settled that if a man hands over the indicia of title to a third person for the purpose of enabling that person to raise money, either for his own benefit¹ or for the benefit of the owner², but with a limit on the amount, the lender being ignorant of the limit is entitled to charge for the whole amount advanced although it exceeds the limit³. Similarly, where a person has been held out to everybody as a partner and, though in reality an agent, has been allowed to act as a principal in carrying on a business, and invested with an apparent authority to enter into contracts incidental to it, his authority cannot be limited by a secret reservation⁴.

6. Usage of business.—A party employing an agent to contract for him is bound by the usage of the particular place or market⁵, provided the usage is reasonable and valid⁶. Thus, a principal by directing an agent to purchase shares necessarily gives authority to pay for them according to the rules of the Stock Exchange⁷, provided the custom is reasonable and legal⁸. A usage that the fees of the quantity surveyor are paid by the builder whose tender has been accepted by the building owner is valid though there is no privity of a contract between the surveyor and builder, but privity in law is established⁹. Extrinsic evidence of custom and usage, with reference to which the parties presumably contracted, is admissible to annex incidents to written contracts in matters with respect to which they are silent, *e.g.*, in the case of an agreement for lease it is customary for the lessor's solicitor to prepare the lease at the expense of the lessee¹⁰.

7. Authority of factor.—It is the duty of a factor whom goods are consigned for sale to furnish an account of the sale, to pay over the proceeds and to deliver the goods unsold. An action does not lie against the factor

19 *Lloyds Bank v. Cooke*, (1907) 1 KB 794.

20 *Smith v. Prosser*, (1907) 2 KB 735, 744.

1 *Herrick v. Attwood*, 2 DG & J 21.

2 *Brocklesby v. Temperance P. B. Society*, 1895 AC 173.

3 *Rimmer v. Webster*, (1902) 2 Ch 163, 171.

4 *Edmunds v. Bushell*, LR 1 QB 97; *Kinhan v. Parry*, (1911) 1 KB 459; *Re Drabble Bros.*, (1930) 2 Ch 211; (1930) All ER Rep 450; *U. P. B. Society v. Pickard*, (1939) 1 KB 266.

5 *Bayliffe v. Butterworth*, 17 LJ Ex 78; *Nickalls v. Merry*, LR 7 HL 530.

6 *North v. Bassett*, (1892) 1 QB 333.

7 *Smith v. Lindo*, 27 LJCP 335; 141 ER 237.

8 *Davis v. Howard*, 24 QBD 691.

9 *North v. Bassett*, (1892) 1 QB 333.

10 *Reading 1 Co-operative Society v. Palmer*, (1912) 2 Ch 42, 49.

for not accounting or not delivering until demand has been made¹¹. The extent of an agent's authority as between himself and third parties is to be measured by the extent of his usual employment. A factor employed to sell may sell in his own name, and a purchaser may set off a debt due to him from the factor, unless he had notice that the factor is not the principal¹². Though a factor may have no express authority from the principal yet he can bind his principal by a warranty given by him if he has a semblance of authority¹³. In the absence of any limitation on his authority made known to the party dealing with a factor, a factor has authority to sell goods entrusted to him in his own name¹⁴. The mere relation of principal and factor confers ordinarily an authority to sell at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer, but if he receives the goods subject to any special instructions, he is bound to obey them. The authority, whether general or special, is revocable¹⁵. A factor has an authority to sell for money but not to barter¹⁶.

8. Authority of auctioneer.—An auctioneer is by virtue of his employment the agent of both the vendor and the purchaser to sign the contract and binds them both by his signature¹⁷. The mere fact of the employment of an agent, such as an auctioneer, does not involve an obligation on the part of the principal to indemnify the agent against all claims arising out of the conduct of the agent acting within the scope of the agency business. The principal is not liable for a representation made by him which is true but which results in damages to the agent¹⁸. The principal may restrict the authority given to the auctioneer by fixing a reserve price. In such a case the auctioneer has no authority to accept a less price and make a binding contract of sale when the bidder is aware of the limitation on the auctioneer's authority¹⁹. An auctioneer has the implied authority of his principal to sell the latter's goods without reserve. The apparent authority of the auctioneer cannot be repudiated by the principal after a sale has been concluded upon the ground that limitations were placed on the authority of the auctioneer not known to the buyer²⁰. The revocation of the authority of an auctioneer employed to sell property without reserve to the highest bidder is operative *per se*, so is binding upon persons who have no notice of the withdrawal of authority¹.

9. Authority of broker.—The relation between the broker and the person for whom he acts is that of agent and principal. Unlike the factor he is not entrusted with the custody and apparent ownership of the goods, but he is

11 *Topham v. Braddick*, 1 Taunt 572.

12 *Re Henley*, 4 Ch D 133 : (1874-80) All ER Rep 1004.

13 *Dingle v. Hare*, 7 CBNS 145, 159 ; 141 ER 770.

14 *Re Dixon*, 4 Ch D 133 ; *Baring v. Corrie*, 2 B & Ald 137 ; (1814-23) All ER Rep 283.

15 *Smart v. Sanders*, 3 CB 380 : (1843-60) All ER Rep 758.

16 *Guerreiro v. Peile*, 3 B & Ald 616. See Bowstead, Art. 39.

17 *Chaney v. MacIow*, (1929) 1 Ch 461.

18 *Halbronn v. International Horse Agency*, (1903) 1 KB 270.

19 *Mc. Manus v. Fortescue*, (1907) 2 KB 1, 6 : (1904-07) All ER Rep 707.

20 *Rainbow v. Howkins*, (1904) 2 KB 322.

1 *Manser v. Back*, 6 Hare 443, 449.

a mere negotiator to effect business and is paid for his services a commission on the sales resulting from his efforts². He is not considered to be under an obligation to retain for his client the specific shares which may be delivered to him under the contract made for his client. He has, of course, to get into his possession and retain an equivalent number of shares³. He does not undertake to procure the goods ordered of him absolutely and at all events but only to use due and reasonable diligence to endeavour to do so⁴. The broker's duty is to get the parties together and the contract completed. He need not look to the fulfilment of the terms of the contract⁵. The authority of a broker varies in different trades and different markets according to the usages prevailing therein. The usages must be lawful and reasonable⁶, and not the custom of a particular house⁷. A broker has no implied authority to cancel a contract made by him⁸. Brokers have authority to receive payment on behalf of their principal (under a policy of insurance) but the payment is to be made in cash. Payment by a bill of exchange is not payment to the principal⁹. Under the usage in the Colombo market relating to rubber coupons the broker acts as the principal. He can recover damages from the buyer for breach of contract¹⁰. A person who employs a broker must be supposed to give him authority to act as other brokers act. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed¹¹. A custom of trade may control the mode of performance of a contract but cannot change its intrinsic character, therefore, a usage which converts a broker into a principal is unreasonable¹². An agent, e.g., a broker, may make himself either expressly or by custom of trade liable personally on a contract¹³. A stock broker is not under an obligation to retain for his client the specific shares delivered to him under a contract made for his client¹⁴. A broker can close a part of an account and carry over the remainder when his principal is in default. A broker acting in good faith without proper instructions would be entitled to do what would be reasonable in his own interest and in that of his principal¹⁵. He has an insurable interest in goods held for sale when he is liable to the principal for loss of such goods¹⁶.

As pointed out by Kekewich J. in *Chadburn v. Moore*^{16a}, a house or estate

2 *Sushil v. Gauri*, 39 A 81.

3 *Solloway v. Mc. Laughlin*, 177 IC 754.

4 *Fletcher v. Marshall*, 15 M & W 755 : 153 ER 1055.

5 *Fazal v. Muhammad*, 1935 Pesh 56.

6 *Cropper v. Cook*, LR 3 CP 194; *Robinson v. Mollet*, LR 7 HL 802.

7 *Gabay v. Lloyd*, 3 B & C 793 : (1824-34) All ER Rep 422.

8 *Xenos v. Wickham*, LR 2 HL 296.

9 *Hine Bros v. S. S. Insurance Syndicate*, 72 LT 79; *Sweeting v. Pearce*, 7 CBNS 449.

10 *Marakar v. Mel*, 1946 PC 63.

11 *Sutton v. Tatham* 10 Ad & E 27.

12 *Robinson v. Mollet*, LR 7 HL 802.

13 *Fleet v. Murton*, LR 7 QB 126.

14 *Manick v. B. M. Supply*, 1938 N 18.

15 *Samson v. Frazier*, (1937) 2 KB 170.

16 *Maurice v. G. M. Co.*, (1939) AC 452.

16a (1893) 67 LT 257 : 61 LJ Ch 674.

agent is in a different position from a broker at the stock exchange owing to the peculiarities of the property with which he is to deal which does not pass by a short instrument as stocks and shares do but has to be transferred after investigation of title as to which various special stipulations, which might be of particular concern to the owner, may have to be inserted in a concluded contract relating to such property. The parties, therefore, do not ordinarily contemplate that the agent should have the authority to complete the transaction in such cases. That is why it has been held, both in England and here, that authority given to a broker to negotiate a sale and find a purchaser, without furnishing him with all the terms, means "to find a man willing to become a purchaser and not to find him and make him a purchaser"¹⁷.

10. Authority to sign.—An agent may sign the name of the principal only¹⁸. Authority to sign a name may be delegated as it does not involve the exercise of any discretion¹⁹. The words 'per pro' are an express statement, by the person using them, that he acts under a limited authority, and a person taking a bill so accepted takes it at his peril that the agent is acting within the scope of his authority²⁰. An authority to endorse bills of exchange, *etc.*, was held to include, under the circumstances of the case, the authority to endorse by the hand of another¹. "No doubt at common law, where a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorising it; nevertheless, there may be cases in which a statute may require personal signature².

189. Agent's authority in an emergency.—An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

1. The section.—The section is intended to protect the agent, if to safeguard his principal's interest he does certain acts without instructions

17 *Abdulla Ahmed v. Animendra*, AIR 1950 SC 15, 17; *Rosenbaum v. Belson*, (1900) 2 Ch 267; 69 LJ Ch 569; *Durga v. Rajendra*, AIR 1923 Cal 57.

18 *Re Whitley*, 32 Ch D 337.

19 *Brown v. Tombs*, (1891) 1 QB 253.

20 *Stagg v. Elliott*, 31 LJCP 260.

1 *Lord v. Hall*, 19 LJCP 47.

2 *Reg v. Justices of Kent*, LR 8 QB 305, cited in *Re Whitley*, 32 Ch D 337, 341.

from the principal³. The section forms an exception to the general rule governing the conduct of agents as laid down in S. 211 and confers on the agent undefined and exceptional powers for use in an emergency. The section is to a certain extent controlled in its operation by S. 214. A servant employed for a particular purpose can have no authority to delegate the performance of his duty to another person, unless there is a necessity for so doing. This doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for the honour of the drawer. When the driver of an omnibus authorises another to drive it and there is an accident, the master is not liable for the negligent act of the second driver⁴. But it has since been pointed out that an agency of necessity is not confined to shipmaster cases and to bills of exchange. An expanding society demands an expanding common law. Of course, the agency of necessity cannot arise if the agent can communicate with his principal (see S. 214). A seller of goods who cannot deliver the goods owing to war conditions can resell them purporting to act as the original purchaser's agent of necessity⁵. A parent is an agent of necessity to arrange and prepare a marriage settlement of an infant child. The child need not be separately represented by an independent legal adviser⁶. A guard or superintendent of a railway station is not an agent of necessity authorised to employ a surgeon to attend passengers wounded by an accident, so the surgeon cannot recover his fees from the railway company⁷, but the general manager of the railway company is such an agent⁸. The manager of a business has authority to conduct the business, but no authority, in case of necessity, to raise money for that purpose. Such power exists however in the case of the master of a ship and it rests upon the peculiar character of his office⁹; but in *Dhanpat v. Allahabad Bank*¹⁰, it has been held that an agent having authority to carry on a business has implied authority to bind his principal by raising a loan; in particular, if any part of the money so obtained is applied in the business for the principal's benefit, the principal is bound to the extent of the benefit received. Under Ss. 188 and 189 the managing agent, although he has no general power to borrow money, has very extensive powers in an emergency, e.g., when machinery and stores ordered from abroad have arrived and have to be paid for, to do such acts as are necessary for the purpose of protecting his principal from loss and for carrying on the business, he is authorised to obtain temporary accommodation from the bank for the purpose¹¹. The section even authorises an agent to act contrary to

3 *Harkishen v. N. Bank*, 1940 L 412.

4 *Gwilliam v. Twist*, (1893) 2 QB 84 : (1895-99) All ER Rep 1200; *Houghton v. Pilkington*, (1912) 3 KB 308 : (1911-13) All ER Rep 1135.

5 *Prager v. Blatspiel*, (1924) 1 KB 566 : (1924) All ER Rep 524.

6 *Tucker v. Bennett*, 38 Ch D 1.

7 *Cox v. Midland Ry. Co.*, 18 LJ Ex 65.

8 *Walker v. G. W. Ry. Co.*, LR 2 Ex 228.

9 *Hawtayne v. Bourne*, 7 M & W 595; *Re Cunningham & Co.*, 36 Ch D 532.

10 2 Luck. 253.

11 *Dehra Dun-Mussoorie E. T. Co. v. Jagamandar*, 53 A 1009.

the principal's instructions when a sudden emergency arises and when communication is impossible¹².

The authority of the master of a ship to sell the goods of the absent owner is derived from the necessity of the situation in which he is placed ; consequently, to justify his thus dealing with the goods, he must establish (i) a necessity for the sale ; and (ii) inability to communicate with the owner and obtain his directions. Under these conditions and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (within certain limits) of acting for him ; but he is not, in any case, entitled to substitute his own for the will of the owner in the strong act of selling the goods where it is possible to communicate with the owner and ascertain his will. Such communication need only be made where an answer can be obtained¹³. If the shipmaster has time to ascertain the owner's will he is bound to communicate with him, and if he does not, the sale is wrongful¹⁴. A shipmaster may bind the owner for necessary repair done to the ship or supplies provided¹⁵. He may bind the owner by borrowing in case of necessity when it is impracticable to communicate with the owner¹⁶. Under extreme necessity, e.g., when in consequence of damage to a ship it becomes impossible to prosecute the voyage, the master has authority to sell her for the benefit of all parties interested¹⁷, but not where it is possible to communicate with the owner¹⁸. In case of sale of cargo the necessity for such action must be absolute¹⁹, but in case of goods supplied or sums borrowed the act must be reasonably necessary according to the ordinary course of prudent conduct²⁰.

Sub-Agents

190. When agent cannot delegate.—An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

Delegation of authority by agent.—The rule laid down in this section has been thus stated. As a general rule the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person : but this maxim when analysed merely imports that an agent cannot, without authority from

12 *Dayton Price & Co. v. Rohomotollah & Co.*, 29 CWN 422.

13 *Australian S. N. Co. v. Morse*, LR 4 PC 22.

14 *Acatos v. Burns*, 3 Ex D 282, 291.

15 *Webster v. Seekamp*, 4 B & Ald 352.

16 *Edwards v. Havill*, 14 CB 107.

17 *Ireland v. Thompson*, 4 CP 149 ; *Cobequid Marine Insurance v. Barteaux*, LR 6 PC 319.

18 *Re Bonita*, 30 LJ Ad 145.

19 *Freeman v. E. I. Co.*, 5 B & Ald 617.

20 *Gunn v. Roberts*, LR 9 CP 331.

his principal, devolve upon another an obligation to the principal which he has himself undertaken to personally fulfil, and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, where such is the case, the reason of the thing requires that the rule should be relaxed, so as on the one hand, to enable the agent to appoint what has been termed a "sub-agent" or "substitute" and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such principal. An authority to the effect referred to may and should be implied where, from the conduct of the party to the original contract of agency in accordance with usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him as if he has been appointed agent by the principal himself¹.

An agent cannot, as a rule, delegate his authority. An auctioneer's clerk has no authority to sign by the general customs². A broker is the agent of both parties. He cannot, without the authority of his principal, delegate his authority³. Where the power of allotting shares is vested in the directors, they have no power to delegate this duty to others⁴. An agreement among several servants that the service performed by one of them should be treated as service performed by all is not binding on the master⁵. There is a usage in the trade for architects or builders to have their quantities made out by surveyors, architects' employers are liable to the surveyors for the quantities so made out⁶. An agency which requires the exercise of discretion cannot be delegated⁷. *Prima facie* a person having a power of appointment is not entitled to delegate the exercise of the power unless there is something to

1 *De Bussche v. Alt*, 8 Ch D 286 : (1874-80) All ER Rep 1247; *Amrit v. Bhagwan*, 1939 B 435. *Mahinder v. Mohan*, 1939 A 188; *Bir Singh v. Noor Ahmed*, AIR 1972 Gau 122, 125.

2 *Bell v. Balls*, (1897) 1 Ch 663.

3 *Henderson v. Barnewell*, 1 Y & J 387; *Cockran v. Irlam*, 2 M & S 301.

4 *Re Leeds Banking Co.*, LR 1 Ch 561.

5 *Krishna v. Raman*, 69 IC 469.

6 *Moon v. Guardians Witney Union*, 3 Bing. NC 814.

7 *Ess. v. Truscott*, 6 LJ Ex 144.

justify the delegation⁸. It is open to a trustee or a sebaite to appoint a sub-agent, but such appointment must only be as a means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment⁹.

191. "Sub-agent" defined.—A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

192. Representation of principal by sub-agent properly appointed.—Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agents.—The agent is responsible to the principal for the acts of the sub-agent :

Sub-agent's responsibility.—The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

The section.—There is a difference between the relations of the principal and the sub-agent *inter se* and as regards third persons. There is no privity between the principal and the sub-agent, the former, therefore, cannot sue the latter for the recovery of money. The sub-agent is accountable to the agent¹⁰. Where the defendant enters into a contract for work with a railway company and gives a sub-contract to the plaintiff, there is no privity of contract between the plaintiff and the railway company entitling him to sue the company for accounts¹¹. The agent of an agent is not the agent of the original principal, so is neither the agent or trustee of a trustee the trustee of the original *cestui que trust*¹².

The authority to appoint sub-agents to carry through a transaction does not *ipso facto* indicate that thereby a privity of contract is established between the principals and sub-agents or that the agents are discharged from their liability to the principals for the acts of their sub-agents. As a general rule there is no contract between the principals and sub-agents¹³. A banian

⁸ *Perks v. Wood*, 1934 Ch 112 : (1933) All ER Rep 663.

⁹ *Sri Gopal v. Sashi*, 36 CWN 1108.

¹⁰ *New Zealand &c. Land Co. v. Waston*, 7 QBD 374 ; *Cockran v. Irlam*, 2 M & S 301 ; *Banwari v. Pramatha*, (1937) 2 Cal 124 ; but see *Mahinder v. Mohan*, 1939 A 188.

¹¹ *Mahomed v. Fazal*, 130 IC 54 ; *Schmaling v. Thomlinson*, 6 Taunt, 147 : (1814-23) All ER Rep 734.

¹² *Ferguson v. Wilson*, LR 2 Ch 77, reld. to in *Wilson v. Bury*, 5 QBD 518, 526.

¹³ *Mercantile Bank v. Chetumal*, 126 IC 473 ; *Prince v. Oriental Corpn.*, 3 AC 325 : (1874-80) All ER Rep 69 relied on.

employed to sell goods consigned to his employer and who accounts for the same to his employer¹⁴, a *tasildar* employed by a receiver to collect rents¹⁵, a *muccadam* appointed to sell the goods of his principal¹⁶, a *dubash* employed by the managing agents¹⁷, have all been treated as sub-agents under the section¹⁸.

The agent may employ a sub-agent when the nature of the business is such as to require its execution by a sub-agent. The sub-agent in such a case may bring about a privity of contract between the agent's principal and the other contracting party¹⁹. Where an agent, on finding that he is not in a position to render the services required of him for his principal and with the knowledge of his principal employs a sub-agent who carries the transaction through, the sub-agent takes the position and obligation of an agent towards the principal²⁰. A sub-agent, dealing with an agent believing him to be the principal and not suspecting that he is in reality an agent, has a right to consider, to all intents and purposes, the agent as the principal, and can set off any claim he may have against the agent in an answer to a demand of the real principal¹. Where a principal has incurred loss through the fraudulent conduct of a sub-agent, his right of recourse to his own agent for recompense has been over and over again affirmed². It is not a sufficient answer for an agent when called upon to render accounts to say that his neglect was occasioned by the misconduct of his agent³.

The concluding clause of the section gives the agent's principal a right of action against the sub-agent only where in performing acts of the nature contemplated in the section the sub-agent has committed fraud or wilful wrong⁴.

193. Agent's responsibility for sub-agent appointed without authority.—Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

14 *Peacock v. Baijnath*, 18 IA 78.

15 *Purkhit v. Ananda*, 12 CWN 1036.

16 *Nensukhdas v. Birdhichand*, 19 Bom LR 948.

17 *S. I. Industrials Ltd. v. Mindi Rama*, 27 MLJ 501.

18 *Mercantile Bank v. Chetumal*, 126 IC 473.

19 *Q. & R. Railroad Co. v. Quinn*, 12 Moo. PC 232.

20 *Powell v. Jones*, (1905) 1 KB 11.

1 *Montagu v. Forwood*, (1893) 2 QB 350; see *Peacock v. Baijnath*, 18 IA 78.

2 *Stephens v. Badcock*, 3 B & Ad. 354; 110 ER 133; Ex p. *James*, 49 LT 530; *Lloyd v. Grace*, 1912 AC 716; (1911-13) All ER Rep 51 refd. to.

3 *Pearse v. Green*, 1 J & W 135; (1814-23) All ER Rep 405; *Bower v. Peat*, 1 QBD 321, 327; (1874-80) All ER Rep 905.

4 *Nensukhdas v. Birdhichand*, 19 Bom LR 948; *Banwari v. Pramatha*, (1937) 2 Cal. 124.

The section.—S. 192 states that the principal is responsible for the acts of the sub-agent to third persons where the sub-agent is properly appointed. Where, however, he is not so appointed, the agent, and not the principal, is responsible to third persons for the acts of the sub-agent. The agent is also responsible to the principal for the acts of the sub-agent.

194. Relation between principal and person duly appointed by agent to act in business of agency.—Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co., B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

The section.—Ss. 194 and 195 are to be read together, and the authority to create a third person an agent of the principal, referred to in the section, connotes that the agent has a discretion "in selecting such agent for his principal". These sections do not apply to cases where the agent has no power of selection and, if he undertakes the agency, is compelled to appoint a particular nominee of his principal as the agent of the principal for some part of the business of the agency. The test to determine whether the person appointed by an agent is a substituted agent of the principal or the sub-agent of the agent is whether or not privity of contract between the principal and the person so appointed has been created⁵. S. 190 deals with the appointment of sub-agents, S. 194 with that of substituted agents. The legislature has not drawn any sharp distinction between the resultant legal relations called into being between a sub-agent and principal and the substituted agent and the principal. The whole distinction in our law appears to turn upon the original agent naming the person he appoints to represent the principal for the whole or part of the business first entrusted to him. The naming should be to the principal himself so as to bring about privity of contract between them. In the case of a sub-agent no such naming is required, so no such privity of contract is established in law⁶.

⁵ *Chowdhury & Bros. v. Girindra*, 56 C 686; see *De Bussche v. Alt.*, 8 Ch D 286 : (1874-80) All ER Rep 1247, cited under S. 190.

⁶ *Nensukhdas v. Birdhichand*, 19 Bom LR 948.

The appellant was a non-resident company and the respondent was a non-resident, residing at Narnaul in what was the Indian State of Patiala. One Hapur firm was employed by the appellant for forward transaction business of the respondent who had accepted the transactions entered into as also the amount of the profit accruing on those transactions and was only disputing the amount of income-tax deducted, retained and paid on those profits. It was held that under the law the Hapur firm would be an agent of the respondent for that part of the business of the agency as was entrusted to it and "privity of contract arose between the principal and the substitute."⁷

A receiver appointed to carry on business has power to appoint other servants : but the moment he appoints them they become not his servants but the servants of his master. Such an agent, if he receives any money for his principal without any notice that the money has been wrongfully obtained and pays it over to his principal, is not personally liable for the money to the person who paid it⁸. Where mortgagees were appointed by the mortgagor as his agents for realising rent, *etc.*, with power to appoint a substitute, the substitute appointed by the mortgagees was the agent of the mortgagor⁹. Simply because a steward employs servants in the service of his master he is not answerable for the damage done by them. The action must be brought against the hand that committed the injury or the owner for whom the act was done¹⁰. In the case of a public officer appointing subordinates the latter are the servants of the public¹¹. When a bank on the instructions of a customer instructs one of its branch banks to carry out the purpose of the agency, under the section, the branch bank becomes the agent of the customer who is entitled to deal with it. But judges were divided in their opinion as to how far the provisions of the section were qualified, and the legal obligations of a bank reduced, by a banking practice under which a branch bank does not recognise or carry out the instructions given by a client of another branch¹². Where a cheque is drawn by *A* on *X* bank in favour of *B*, who having account with *Y* bank hands over the cheque to *Y* bank, and *Y* bank sends the cheque to *X* bank for collection, *X* bank becomes a substitute agent and not sub-agent of *B*. *Y* bank would not be liable for the amount of the cheque if payment is not received by *Y* bank from *X* bank¹³.

195. Agent's duty in naming such person.—In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case ; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

⁷ *Aggarwal Chamber of Commerce Ltd. v. Ganpatrai*, AIR 1958 SC 269, 270.

⁸ *Owen & Co. v. Cronk*, (1895) 1 QB 265, 272 : 64 LJQB 288.

⁹ *Raja Janki v. Asad*, 14 Pat 560.

¹⁰ *Stone v. Cartwright*, 6 TR 411.

¹¹ *Mersey Docks Trustees v. Gibbs*, LR 52 1 HL 93 : (1861-73) All ER Rep 397.

¹² *Jai Parshad v. Chartered Bank*, 102 IC 788. The practice was recognised in *Clare & Co. v. Dresdner Bank*, (1915) 2 KB 576 : (1914-15) All ER Rep 617.

¹³ *Punjab National Bank v. Firm Ishwarbhai*, AIR 1971 Bom 348, 353.

Illustrations

(a) A instructs B, a merchant, to buy a ship for him, B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Ratification

196. Right of person as to acts done for him without his authority. Effect of ratification.—Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

1. Ratification.—Ratification, in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier^{13a}. It is used to express the conduct of a principal, who endorses the action of his agent, which at first took place without the principal's authority¹⁴, but not against his express authority¹⁵. A principal may ratify a contract made by his agents without his authority¹⁶. "That an act done for another, by a person, not assuming to act for himself, but for such other person, though without any previous authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority"¹⁷. Ratification in law is equivalent to previous authority¹⁸. It follows that the act of the person purporting to act as an agent is voidable. If the act is not ratified, it will become void; if it is ratified, it will be validated¹⁹. Where a time limit is prescribed for the exercise of an option, not only must the option be exercised but the ratification should be made, where the option has been exercised without authority, within the prescribed time, for time is of the essence of the contract in such a case²⁰. The first essential to the doctrine of ratification is that the agent shall not be acting for himself but shall be acting to bind

13a *Bhagwat v. Debi*, 35 IA 48, 58.

14 *Janki v. Dhokar*, 156 IC 200.

15 *Madura Municipality v. Naidu*, 1939 M 957.

16 *Ex. p. Bosanquet*, 45 Ch D 16; *Howard v. Chapman*, 4 C & P 508.

17 *Wilson v. Tummam*, 6 M & G 236, 242; *Jai Narain v. Bechoo*, 176 IC 369.

18 *Bhavani v. Gordhan*, 1943 PC 66.

19 *Jai Narain v. Bechoo*, 1938 A 369.

20 *Dibbins v. Dibbins*, (1896) 2 Ch 348; *Madura Municipality v. Naidu*, 1939 M 957.

a named principal. When an agent appropriates the principal's money to pay off the debt due to a bank, the principal can sue either or both the agent and the bank¹.

2. **On behalf of another.**—No ratification is possible where the agent does not purport to act, without authority, on behalf of his principal. Thus, the purchase by an agent in an execution sale of property on his behalf, not professing to act on behalf of any principal, cannot be ratified under this section nor can advantage be taken of S. 216². A ratification of the unauthorised contract of an agent can only be effectual when the contract has been made by the agent avowedly for, or on account of, the principal, and not when it has been made on account of the agent himself³. As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorised agent, can sue or be sued on the contract. An exception, however, results from the doctrine of ratification. By a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he is not, a party to the contract. But a contract made by a person avowedly for himself as principal, and without any authority to act for another, cannot be ratified so as to enable him to sue or be sued on the contract⁴. An underwriter however may effect an insurance, on the chance of its being adopted, for the benefit of all those owners to whom it might appertain, for those who might subsequently adopt it, though not communicated with at the time of insurance⁵. But if a person, claiming the benefit of a policy of assurance, be such as those who effected the policy had not in contemplation, his claim cannot be allowed⁶. The heir of a deceased person, on being ascertained, may ratify the act of an agent in realising rents from premises held by the deceased⁷. A principal can validly ratify a contract made in his name, though without his authority and though the agent had the fraudulent intention of dealing with the subject matter of the contract on his own account and for his own benefit⁸. Where a stranger makes a payment in the name and on behalf of another without authority it is competent for the debtor to ratify the payment; but if the person had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, thereupon the debtor is again responsible⁹. Payment by a person on behalf of a debtor, if ratified by the debtor, will operate as payment by the debtor himself¹⁰. Under sections

1 *Imperial Bank v. Begley*, 1936 PC 193.

2 *Raghavachari v. Pakkiri*, 30 MLJ 497; *Kandasami v. Somaskanta*, 20 MLJ 371.

3 *Shiddheshwar v. Ramchandrarav*, 6 B 463.

4 *Keighley Maxted & Co. v. Durant*, 1901 AC 240.

5 *Hagedorn v. Oliverson*, 2 M & S 485.

6 *Boston Fruit Co. v. British and Foreign Marine Insurance Co.*, 1906 AC 336.

7 *Lyell v. Kennedy*, 14 AC 437, 456.

8 *Re Tiedemann*, (1899) 2 QB 66.

9 *Walter v. James*, LR 6 Ex 124.

10 *Belshaw v. Bush*, 22 LJCP 24, 28 : 138 ER 444.

196 to 200 it is open to a decreeholder to ratify the act of an unauthorised agent who had purported to act on the decreeholder's behalf in assigning the decree¹¹.

3. Without knowledge and authority.—An act done by an agent, though in excess of his authority, may be ratified by his principal¹², but no general power can be conferred on an agent to act in excess of his authority¹³. It is well known that where *A* does an act as agent for *B* without any communication with *C*, *C* cannot, by afterwards adopting that act, make *A* his agent, and thereby incur any liability or take any benefit under that act of *A*¹⁴.

4. Effect of ratification.—A subsequent ratification is tantamount to a prior command of an act done in the name of the party who ratifies. Therefore, where the holder of a bill of exchange, without the knowledge or authority of the plaintiff, endorses and delivers it to an attorney for the plaintiff, in order that an action may be brought upon it in his name, and the plaintiff after action brought ratifies the act, the subsequent ratification is equivalent to a prior authority, so the plaintiff has a valid title to sue on the bill¹⁵. Where work is done on the credit of the estate of a deceased person by the order of one who afterwards obtains administration and ratifies the contract the estate is bound¹⁶. A principal is responsible for the wrongful act of his agent committed under prior authority given by the principal or done without authority but subsequently ratified by the principal. Receipt of money is proof of such ratification¹⁷. It has even been held that no revocation of an offer is possible after it has been accepted by an agent but before ratification by the principal, for the ratification, when made, relates back to the date of acceptance by the agent¹⁸.

5. What acts cannot be ratified.—A ratification is in law treated as equivalent to a previous authority. It follows that, as a general rule, a person or body of persons, not competent to authorise an act, cannot give it validity by ratifying it¹⁹. Opinion seems to be divided as to whether a document containing a forged signature cannot be adopted or ratified for use for civil purposes²⁰. An act which is *ultra vires* a company is null and void and cannot be ratified¹. In *Savay v. King*², it was held that there could be no ratification of an invalid transaction, when the person performing the supposed act of ratification has been kept by the conduct of the party in whose favour it

11 *Bhavani v. Gordhan*, 70 IA 50.

12 *Secretary of State v. Kamachee*, 7 MIA 476.

13 *Irvine v. Union Bank*, 4 IA 86.

14 *Ghasiram v. Raja Mohan*, 6 CLJ 639.

15 *Ancora v. Marks*, 7 H & N 686.

16 *Ex. p. Phillips*, 18 QBD 116.

17 *Freeman v. Rosher*, 13 QB 780; see illust. (b).

18 *Bolton Partners v. Lambert*, 41 Ch D 295, commented in *Fleming v. Bank of New Zealand*, 1900 AC 577, 587.

19 *Irvine v. Union Bank*, 4 IA 86.

20 *Brook v. Hook*, LR 6 Ex. 89; *M' Kenzie v. British Linen Co.*, 6 AC 82, 99.

1 *Ashbury Carriage Co. v. Riche*, LR 7 HL 653, 673.

2 5 HLC 627, reld. to in *Raja Mohan v. Nisar*, 164 IC 945.

was made unaware of the invalidity of the first transaction and has not, at the time of the supposed ratification, the means of forming an independent judgment. A minor cannot ratify a mortgage of his immovable property made by his guardians without the sanction of the court, as such a mortgage is void *ab initio*³. The general rule is that although a voidable act may be ratified, it is otherwise when the act is originally and at its inception void⁴. So also the ratification of the act of an agent by the principal made after the expiry of the period of limitation is of no effect⁵.

Ratification can only be by a person ascertained at the time of the act done by a person in existence either actually or in contemplation of law⁶. A contract entered into on behalf of a company before it is incorporated is not binding on the company; and after it comes into existence, the company cannot ratify the contract entered into before its incorporation. It can, of course, then enter into a new contract upon the same terms⁷. A promoter cannot recover the stamp duty or registration fees paid by him from the company on its incorporation⁸. A subscriber to a memorandum cannot have rescission on the ground that he was induced to become a subscriber by the misrepresentations of an agent of a company, because a company is not liable for the acts of its agents done before its incorporation⁹. Ratification in advance seems to contradict the essential attributes of ratification. It may only amount to a promise to adopt acts done within the ostensible authority¹⁰.

6. Public agents.—The acts of a Government officer bind the government only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceeds that authority, when the Government, in fact, or in law, directly or by implication, ratifies the excess¹¹. The doctrine of ratification does not probably apply to a contract signed by a collector where the collector has no authority to enter into the contract¹². As to the ratification of an act of a public agent by a Government order, see *Rajagopalacharyulu v. Secretary of State*¹³. The official receiver cannot sell property in the absence of an order by the court. A subsequent ratification of the act by the court will pass a good title to the vendee¹⁴.

197. Ratification may be express or implied.—Ratification may be express or may be implied in the conduct of the person on whose behalf the acts are done.

3 *Mauji Ram v. Tara Singh*, 3 A 852.

4 *Brook v. Hook*, LR 6 Ex. 89; *Shyam v. Rameshwar*, 1942 P 213.

5 *Punjab Z. Bank v. Madan*, 161 IC 957.

6 *Kelner v. Baxter*, LR 2 CP 174.

7 *Re Northumberland Avenue Hotel Co.*, 33 Ch D 16.

8 *Clinton's Claim*, (1908) 2 Ch 515; *Scott v. Ebury*, LR 2 CP 255, 267.

9 *Re Metal Constituents Ltd.*, (1902) 1 Ch 707.

10 *Midland Bank v. Reckitt*, 1933 AC 1; (1932) All ER Rep 90.

11 *Collector of Masulipatam v. Cavalry Vencata*, 8 MIA 500, 544; *Secretary of State v. Kamachee*, 7 MIA 476; *Brojesh v. S. of S.*, 1939 C 81.

12 *Secretary of State v. Bhagwandas*, 40 Bom LR 19.

13 38 M. 997.

14 *Garapati v. Basava*, 85 IC 439.

Illustrations

(a) *A*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account; *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts interests on the money from *C*. *B*'s conduct implies a ratification of the loan.

The section.—Ratification may be express or may be effected impliedly by conduct¹⁵. The illustrations to the section show that in the absence of other evidence to explain the conduct of the principal, the circumstances mentioned in the illustrations will be treated as implying ratification¹⁶. An express ratification within the meaning of S. 197 cannot become complete until it is communicated to the other party. Till then it is liable to revocation. A mere mental ratification of an agent's unauthorised acts by a principal is not enough to bind the principal. Ratification by a long course of conduct is not less effective than ratification by a formal declaration¹⁷. If *A* voluntarily pays *B*'s debt, *B* is under no obligation to pay *A*. There must be a previous request, express or implied, to raise such an obligation. A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else. Ratification only takes effect in law from its being equivalent to a previous authority, and a previous authority is an incident which only arises in the relation of principal and agent¹⁸. A reference to arbitration by an agent, without authority, is binding on the principal if he stands by and acquiesces in the proceeding. The principal is deemed tacitly to ratify the action of the agent¹⁹. By acquiescence or by not disavowing within a reasonable time, a principal may become bound by a contract of the agent done ostensibly in the exercise of his authority but in reality in excess of it²⁰. A principal is responsible for the wrongful act of his agent committed under a prior authority given by the principal or done without authority but subsequently ratified by the principal. Receipt of money is proof of such ratification¹. The acts relied upon as proving ratification must be clearly inconsistent with a denial of liability².

198. Knowledge requisite for valid ratification.—No valid ratification can be made by a person whose knowledge of the case is materially defective.

15 *Bhavani v. Gordhan*, 207 IC 131.

16 *Kadiresan v. Ramanathan*, 102 IC 561.

17 *Rajagopalacharyulu v. Secretary of State*, 38 M 997, see as to the ratification of an officer by a Government order.

18 *Falcke v. Scottish Imperial Preference*, 34 Ch D 234, 239 : (1886-90) All ER Rep 768, cited in *Clinton's Claim*, (1908) 2 Ch 515.

19 *Saturjit v. Dulhin*, 24 C 469, 472.

20 *Mountcashel v. Barber*, 23 LJCP 43; *Morrison v. L. C. & W. Bank*, (1914) 3 KB 356.

1 *Freeman v. Rosher*, 13 QB 780, see illust. (b).

2 *Narayan v. Chandrabhan*, 48 IC 959.

The section.—It is difficult to say where acquiescence becomes ratification. "Acquiescence and ratification must be founded on a full knowledge of the facts and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence and adoption of the transaction"³. There can be no ratification of an act unless it is communicated to the other side, or subsequent actions show an approbation of the contract⁴. Because effective ratification involves knowledge of all the material facts on the part of him who ratifies⁵. There can therefore be no ratification of an illegal act without knowledge of the illegality⁶. Ratification implies an intention to ratify on the part of the principal, and any act of his can be relied on as amounting to ratification only if done after he had full knowledge of the material facts of the transactions ratified. Trying to minimise the loss by dealing with the subject matter of a contract after express repudiation of the contract is not a ratification of the contract because the intention to ratify is absent. Of course, after repudiation there may be ratification by conduct, but clear evidence is necessary to show that the principal has gone back on his original intention⁷.

"To constitute a binding adoption of acts *a priori* unauthorised these conditions must exist ; (i) the acts must have been done for and in the name of the supposed principal ; and (ii) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were." "Where the supposed ratification relates to acts as to which there is no pretence of any *a priori* authority.....where it is not a question merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or, in the alternative, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts, whatever they were or however culpable they were." Where a principal was informed of the unauthorised use of his name by the agent which he ratified, but the agent by fraud and forgery obtained money by using the principal's name, the principal's ratification in the absence of knowledge of details was not enough to fix him with liability for the fraudulent acts of his agent⁸. In order to establish a case of ratification it is essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and after notice of that fact the principal consciously by an overt act agreed to be bound by it or by acquiescence in the situation arising thereafter allowed the business to continue. In either case, it appears that consciousness of the act done

3 *La Banque v. La Banque*, 13 AC 111, 118.

4 *Ganpat v. Ishwar*, 1938 N 482.

5 *Sadasheo v. Shankar*, 175 IC 494.

6 *Premila v. People's Bank*, 1939 L 1 PC.

7 *Kadiresan v. Ramanathan*, 102 IC 561 ; *Ramanathan v. Bank of Bengal*, 23 IC 516.

8 *Marsh v. Joseph*, (1897) 1 Ch 213, 246-7 ; *Surendra v. Kedar*, 63 CLJ 86, 95-6 ; *Bank of Montreal v. Dominion*, G. G. C., 1930 AC 659.

by the agent without authority must be proved and, secondly, it should be proved that, after notice of such unauthorised act, the principal adopted the transaction⁹. Ratification (or acquiescence) without knowledge of a man's rights amounts to nothing. Acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as to make it fraudulent for him to set up those rights¹⁰.

199. Effect of ratifying unauthorized act forming part of a transaction.—A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

The section.—The acts of an agent cannot be affirmed in part and avoided as to the rest. Where the act of a person has once been affirmed and he has been treated as an agent, he cannot afterwards be treated as a wrongdoer¹¹. "Where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens. The contract must be performed in its integrity"¹². "The principal cannot, on his own authority, ratify a transaction in part and repudiate it as to the rest, hence the general rule is deduced that where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent"¹³.

200. Ratification of unauthorized act cannot injure third person.—An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

(a) *A*, not being authorized thereto by *B*, demands on behalf of *B* the delivery of a chattel, the property of *B*, from *C*, who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person, gives notice of termination to *A*. The notice cannot be ratified by *B* so as to be binding on *A*.

⁹ *Pratt v. Sassoon*, 60 B 326

refd. to ; *Chetti v. Official Assignee*, 1937 ALJ 1381 PC.

¹⁰ *Hope Mills v. Readymoney*, 10 IC 748, 766 ; *Wilmott v. Barber*, 15 Ch D 96, 105

¹¹ *Brewer v. Sparrow*, 7 B & C 310 : (1824-34) All ER Rep 525 ; *Keay v. Fenwick*, 1 CPD 745.

¹² *Bristow v. Whitmore*, 9 HLC 391, 404.

¹³ Story on Agency, § 250, cited in *Katparyani v. Port Canning*, 19 CWN 56.

The section.—The section formulates an exception to the general rule set out in S. 196, namely, “that subsequent ratification is equivalent to prior authority.” Ratification does not relate back to the date of acceptance when the interests of third parties intervening are concerned¹⁴. Ratification of a contract of fire insurance is not possible after loss and with knowledge of the loss. A rule which permits a principal to ratify an insurance even after the loss is an anomalous rule which it is not desirable to extend¹⁵.

The section lays down the rule that where before ratification the right of a third person has accrued and has become complete, in such a case the principal cannot ratify the unauthorised act of the agent to the prejudice of the third person. The case is different where the question is between the self-constituted agent and the ratifying principal and no question of *jus tertii* intervenes¹⁶. Under this section a principal cannot ratify an act to the prejudice of a third person. If an agent acts without authority and thereby prejudices the rights of third persons, the ratification by the principal would not validate the act. But where the principal's property is alienated and the only person that could be prejudiced is the principal himself, S. 200 does not stand in the way of such an act being ratified by the principal¹⁷.

Illustration (b) to S. 200 embodies the principle that rights of property cannot be changed retrospectively by ratification of an act inoperative at the time, or, as has sometimes been said, to make an act rightful which otherwise would be wrongful it must be at a time when the principal could still have lawfully done it himself¹⁸. It is incontestable that if a notice to quit is given by an unauthorised person a subsequent ratification will not make it effectual, since the notice must be one which is in fact binding on the principal when it is served¹⁹. A ratification after breach cannot enable the principal to sue for a breach that has taken place before the ratification²⁰. The grant of a *melcharth* in property previously mortgaged may be ratified¹.

Revocation of Authority

201. Termination of agency.—An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

14 *Ford v. Newth*, (1901) 1 KB 683; C & S 492.

15 *Grover v. Mathews*, (1910) 2 KB 401.

16 *Lyell v. Kennedy*, 14 AC 437, 462.

17 *Garapati v. Basava*, 85 IC 439.

18 *Doe v. Walters*, 10 B & C 626: (1824-34) All ER Rep 428.

19 *Cassim v. Eusuf*, 23 CLJ 453, 461, 462.

20 *Kidderminster, Mayor of v. Hardwick*, LR 9 Ex 13, 22.

1. *Kozhikot v. Sankara*, 73 IC 376.

1. **The section.**—The section deals with the various modes of determining the authority of an agent. The section is qualified by Ss. 202 to 210. There is a difference between the revocation of authority by death and that by the act of the party himself who gave it. As regards revocation by the party himself, the reasonable expenses incurred by reason of the contract might be recovered by him; but this would not be the case where the revocation was by death². A power of attorney executed by a certificated guardian of a minor can only terminate under this section³. As to when the termination of the agent's authority takes effect, see S. 208.

2. **Completion of the business of the agency.**—An agency, unless it is for a fixed term, obviously continues and may be terminated at the pleasure of the principal. By its very nature it is personal, neither transferable nor assignable, and depends entirely on the agreement made with the principal⁴. When a principal before leaving India executed a power of attorney authorising the agent to act in his absence, subsequently the principal came to India and again left without executing a new power, the agent had power to act for the principal⁵. It has been stated that the business of agency is not terminated on the sale of goods and the receipt of the money by the agent, "inasmuch as there is a subsequent obligation to account for the sums and to pay them" to the principal under S. 218⁶. But this view has not been adopted by the Madras High Court which has held "that the agency is determined when the agent ceases to represent the principal, though his liability in respect of acts done by him as agent may continue"⁷. Where the agency is one of sale only, e.g., in the case of an auctioneer, the moment after the sale the agent is no longer the agent of the principal and he has no authority to deal with the terms upon which the title is to be made out⁸. Where one bank despatches money according to the directions of another bank, the agency is *ipso facto* terminated as soon as the drafts in accordance with the instructions are despatched⁹. Agency, in the absence of evidence to the contrary, terminates with the last transaction of the business of the agency¹⁰. The question when an agency terminates is a question of fact in each case. The fact that certain items of credit were handed over at the place of business in a foreign country to the successor does not necessarily put an end to the agency of the predecessor¹¹.

2 *Campanari v. Woodburn*, 24 LJCP 13 : 15 CB 400 : 3 WR 59.

3 *Madho v. Kanhaiya*, 1946 A 1.

4 *Prem v. Govind*, 1943 S 197.

5 *Ezekiel v. Carew*, 1938 C 423.

6 *Babu Ram v. Ram Dayal*, 12 A 541, 545, fold in *Fink v. Buldeo*, 26 C 715, 724.

7 *Venkatachalam v. Narayanan*, 39 M 376, 379, case under Limitation Act; *Kuppusamy v. Veerappa*, 37 IC 875; *Soma v. Nachal*, 1935 M 707.

8 *Hunter v. Seton*, 7 Ves. 265, 276 : (1775-1802) All ER Rep 163.

9 *Alliance Bank v. Amritsar Bank*, 31 IC 215.

10 *Ruchiram v. Charan*, 110 IC 575; *Ram v. Tatyia*, 19 IC 549, see as to termination of agency of a lambardar.

11 *Nagappa v. Chidambaram*, 31 MLJ 687.

3. **Death of principal or agent.**—It is not an inflexible rule of law that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased, but also as regards the surviving principal. The court in each case has to determine the true intention of the parties to the contract from the terms thereof and from the surrounding circumstances¹². But the view that where the agency is created by more than one principal, the death of one or some of them terminates the agency has been favoured in a case decided by the Madras High Court¹³. An agent may be so constituted that his authority will terminate on the death of one of the partners of the principal firm¹⁴.

A contract of agency is determined by the death of the principal or agent. A master therefore cannot sue a person who kills his servant though the master loses the servant's services¹⁵. The retainer of a solicitor ceases on the client's death even though the solicitor has received no notice of such death, items of cost in a pending suit after that event will be disallowed¹⁶. Where a document was presented for registration by an agent acting under a power of attorney on behalf of a principal, who happened to be dead at the time, the Registrar being aware of the principal's death accepted and registered the document, the registration was invalid¹⁷. A married woman who had full authority to contract is not liable for goods supplied to her after her husband's death abroad and before communication of the news to her¹⁸. An ordinary contract of employment, e.g., to sell a picture for a commission, is revoked by the death of the employer. The administrator is not liable unless there is a confirmation of the sale by him after the death of the intestate¹⁹. Where an agent sells certain goods, but is not aware that his principal was dead at the time, subsequently the administrator sues for the price of the goods, the grant of administration relates back to the time of the testator's death, so the administrator is entitled to sue. It is no objection that the administrator, at the time of the contract, was unknown. Subsequent ratification is equivalent to prior command²⁰. The relation back of letters of administration exists only for the benefit of the estate, and enables the administrator to recover against those who interfere with the estate and so prevent it from being despoiled¹. Where on the death of the principal the agent continues to render service to the legal representatives, a new agency

12 *Re Sital Prosad*, 21 CWN 620, 627, *Budh Singh v. Dinendra*, 11 CLR 322 *refd. to*; *Manindra v. Hari*, 1936 C 650.

13 *Venkanna v. Atchuta*, (1938) 1 MLJ 610.

14 *Pariante v. Lubbock*, 8 DGM & G 5.

15 *Osborn v. Gillett* LR 8 Ex 88 : (1861-73) All ER Rep 923.

16 *Pool v. Pool*, 58 LJP 67; *Dhanrajgirji v. Payne & Co.*, 58 B 1.

17 *Mujubun-Nissa v. Abdur Rahim* 23, A 233; *Blades v. Free*, 9 B & C 167 *refd to*; see S. 208 n. 2.

18 *Smout v. Ilbrey*, 12 LJ Ex 357.

19 *Campanari v. Woodburn*, 24 LJCP 13.

20 *Foster v. Bates*, 13 LJ Ex 88.

1 *Morgan v. Thomas*, 22 LJ Ex 152.

is created between the agent and the legal representatives from the date of the death of the former principal². Where there are two joint agents and one of them dies, upon his death, the contract of agency terminates in so far as he is concerned but not as regards the surviving agent. S. 201 controls S. 42³. Where the *karta* of a joint family appoints an agent, the agency does not terminate with the death of the *karta*, he continues to be the agent of the joint family till he is dismissed⁴.

If on the outbreak of war the principal is declared an enemy alien, the agency is terminated. The agent may purchase the stock of the principal from the custodian. If he makes any profit by reselling the stock he is not liable, in the absence of any fiduciary duty, to account for the profit made by him to his former principal⁵.

4. **Agency for a fixed term.**—It is an elementary principle that where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently, where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended⁶. A general authority to a broker to sell may expire on a particular day according to the usage of trade, so that a contract for sale after that date is not binding on the principal⁷. A salary chit containing the term, "I shall carry on the business for 3 years as per your letter," means that the agency shall last for 3 years certain. It does not mean that after the expiry of 3 years there is a fresh agency but only that the same agency continues⁸.

5. **Bankruptcy.**—The bankruptcy of the principal operates as revocation of the authority of the agent, except as to transactions, according to English law, which took place without notice of such bankruptcy⁹. Goods of the principal in the possession of the agent, in specie, are recoverable by the principal on insolvency of the agent¹⁰.

202. Termination of agency, where agent has an interest in subject-matter.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

2 *Bir v. Jadab*, 40 CWN 245.

3 *Bhagirath v. Prem Chand*, 17 CLJ 201; *Agarwal v. Kasam*, 1937 N 314.

4 *Shankar v. Toshani*, 32 ALJ 45.

5 *Nordisk Insulin laboratorium v. Gorgate Products Ltd.*, (1953) 2 WLR 879 CA (1953) 1 All ER 986.

6 *Laljee v. Dadabhai*, 23 CLJ 193, 202.

7 *Dickinson v. Lilwall*, 4 Camp. 279.

8 *Ramanathan v. Kasi*, 31 MLJ 685.

9 *Re Snowball*, LR 7 Ch 534, 548; *Markwick v. Hardingham*, 15 Ch D 339.

10 *Re Smith*, 10 Ch D 566.

Illustrations

(a) A gives authority to B to sell A's land, and to pay himself out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

The section.—This section, in laying down the first exception to the general rule set out in S. 201, states that the authority of the agent cannot be terminated, in the absence of express contract, where the authority is coupled with interest in the subject matter of the agency. The section does not state when an agent can be said to have such interest. The combined effect of Ss. 201, 202 and 203 is that the principal has power to revoke unless the agent has an interest in the subject matter of the agency, or unless the agent has exercised his authority so as to bind his principal. The interest which an agent has in effecting a sale and in the prospect of remuneration to arise therefrom is not such an interest as would prevent the termination of the agency. Nor does S. 203 preclude the revocation of the authority, for at no time was the authority so exercised as to bind the principal, no contractual relation with any third party was at any time created before the revocation of authority¹¹. The section does not make any departure from the English law on the subject¹². Under the section an agent for the collection of rents¹³, or for the sale of goods¹⁴, cannot be regarded as having an interest in the property merely because he is authorised to take his salary out of the rent or the sale proceeds of the goods. The fact that the person to whom a power of attorney for managing a temple is given is a member of the family for whose spiritual benefit the temple was erected does not make the agency an agency coupled with interest so as to render the agency irrevocable. A promise not to revoke a power of attorney is not specifically enforceable¹⁵. Where in consideration of a loan advanced by the defendants, certain lands were made over to them by the plaintiff, they having received authority from the plaintiff to manage the lands and to receive the rents and profits in lieu of interest, as such authority was given them in consideration of the loan to the plaintiff, the authority could not be terminated until the loan was repaid¹⁶. A member of a *tarward* entitled to be maintained out of the *tarward* property has a clear interest in the rent. The cancellation of his power of attorney is illegal if the conditions for such cancellation have not been duly complied with¹⁷. The principal has a right under the next section to revoke the authority given to the agent whether or not the agency was

11 *Lakhmichand v. Chotooram*, 24 B 403.

12 *Ram v. Chinu*, 1944 B 76.

13 *Vishnucharya v. Ram*, 5 B 253.

14 *Dalchand v. Hazarimal*, 136 IC 878.

15 *Lodd Govindoss v. Gopesarlalji*, 121 IC 598, head note.

16 *Shree Lon v. Hla*, 47 IC 133.

17 *Chattu v. Kundan*, 61 MLJ 852.

created for a valuable consideration. The mere arrangement that the agent's salary should be paid out of the rents cannot be regarded as giving to the agent an interest in the property which formed the subject matter of the agency. The Legislature has not adopted to its full extent the dictum in *Bromley v. Holland*¹⁸ that where a power of attorney was granted upon a valuable consideration, the court would not permit it to be revoked¹⁹. Mere advances made by a factor, whether at the time of his employment as such or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances are accompanied by an agreement that the authority shall not be revocable. In illustration (b) the authority to appropriate the sale proceeds is expressly given, but in the section itself there is no limitation to cases where the authority is so expressly given. All that is necessary under the section is that the agent should himself have an interest in the property to be sold and, it seems, such interest may be inferred from the language of the document and from the course of dealings between the parties, so need not be expressly given. It is the existence of an interest, not the mode in which it is given, that is of importance²⁰. In illustration (b) the authority is given for the purpose of being a security for a debt, so it is irrevocable. If the authority be given independently, and the interest of the agent arise subsequently, and only incidentally, that is not an authority coupled with an interest¹. Thus, a power of attorney in favour of a stranger authorizing him to conduct a suit and entitling him to a share in the property when recovered is not an authority coupled with interest. The principle laid down in the section does not apply to such a case².

2. **Authority coupled with interest.**—What is meant by authority coupled with interest being irrevocable is this that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority such an authority is irrevocable³. Thus, if *A* be indebted to *B*, and in order to discharge the debt, *A* executes in favour of *B* a power of attorney authorizing him to sell certain lands belonging to him, *A*, this is an authority coupled with an interest and so cannot be revoked⁴. A contract, under which the lessees of a quarry appoint a person as their local agent with liberty to quarry, manufacture and sell lime and stone from the land on his own account without being liable to the lessees for any of the profits or losses thereof, is not a sub-lease but is an agency coupled with an interest⁵. So also a vendor promoter of a company, who is to be paid a commission out of the money raised by

18 7 Ves. 28.

19 *Vishnucharya v. Ram*, 5 B 253.

20 *Kondayya v. Narasinhulu*, 20 M 97; see *Jafferbhoy v. Charlesworth*, 17 B 520, 545.

1 *Smart v. Sandars*, 5 CB 895, 917: (1843-60) All ER Rep 758, refd. to in *Venkanna v. Atchuta*, (1938) 1 MLJ 610.

2 *Venkanna v. Mullapudi*, 1938 M 542.

3 *Clerk v. Laurie*, 2 H. & N. 199, cited in *Carmichael's Case*, (1896) 2 Ch 643, fold in *Re Olympic Reinsurance Co.*, (1920) 2 Ch 341: (1920) All ER Rep 693.

4 *Gausson v. Morton*, 10 B. & C. 731; see *Re Sital Prasad* 21 CWN 608, 627.

5 *Secretary of State v. Kuchwar L. & S. Co.* 17 Pat. 69 PC.

the issue of shares, has a clear and direct interest in raising the capital. An underwriter who promises to buy a certain number of shares from the promoter and authorizes him to make the necessary application cannot revoke the authority, this being an authority coupled with interest⁶. Where in consideration of an advance made by an agent a lease is granted to the agent with power to realise rents by suit, the authority being coupled with interest is irrevocable⁷. Power of attorney to an agent to execute a decree, the agent to get half the proceeds and to be indemnified for out of pocket expenses, does not create an agency coupled with interest⁸. When a vendee retains a portion of the purchase money to pay off prior encumbrances, his agency cannot be revoked⁹. Where a decree-holder indebted to a Bank executes a power of attorney in favour of the Bank authorising the Bank to execute the decree and credit realisation for discharging his debt, the power constitutes equitable assignment and is not revocable. The Bank can execute the decree in its own right¹⁰.

203. When principal may revoke agent's authority.—The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

Revocation of agent's authority.—The employment of an agent may be revoked before performance¹¹. Where an agent has merely appropriated to the principal a contract entered into by himself with a third party, he has not by such appropriation brought about any contractual relation with any third person, the agent's authority may therefore be revoked¹². The authority given to an auctioneer to sell goods by auction may be revoked at any time before the goods are knocked down¹³. An authority to pay over money for an illegal purpose may be revoked before the money is paid over¹⁴. An agreement to serve as an agent may be rescinded like any other agreement subject to the qualification laid down in the following sections¹⁵. Where the authority is conferred by two or more principals jointly, the authority may be revoked by one, so it is sufficient if the notice of revocation is given by one of the principals¹⁶.

6 *Carmichael's Case*, (1896) 2 Ch 643.

7 *Subramania v. Narayanan*, 24 M 130, *Pestanji v. Matchett*, 7 BHCRAJ 10 reff. to; *Jagabhai v. Rustamji*, 9 B 311.

8 *Palani v. Krishna*, 1946 M 9.

9 *Avvari v. Konda*, 1943 M 482.

10 *Seth Loon Karan v. I. E. John*, AIR 1969 SC 73.

11 *Toppin v. Healey*, 11 WR (Eng.) 466; *Vynior's Case*, 8 Rep 80a fold.

12 *Lakhmichand v. Chotootam*, 24 B 403.

13 *Warlow v. Harrison*, 1 E. & E. 309 : (1843-60) All ER Rep 620.

14 *Hastelow v. Jackson*, 8 B. & C. 221 : (1824-34) All ER Rep 529; *Taylor v. Bowers*, 1 QBD 291 : (1874-80) All ER Rep 405; *Bone v. Eckless*, 29 LJ Ex. 438.

15 *Rajaram v. Abdul*, 31 IC 450.

16 *Dasarath v. Brojo Mohon*, 18 CLJ 621, doubted in *Kirtyanand v. Ramanand*, 164 IC 220.

204. Revocation where authority has been partly exercised.—The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

The section.—The rule laid down in the section follows from what has been stated in the previous section. It is also a natural corollary of the rule laid down in S. 222. Where the agent has partly exercised his authority, he has done an act which is binding on the principal and rights of third persons may have come into existence; accordingly, the principal is not allowed to revoke his authority and thus relieve himself of the obligation that has already been incurred.

If a principal employs an agent to perform an act, and, if upon revocation of the authority, the agent will be by law exposed to loss or suffering, the authority cannot be revoked. The rule will be the same where the agent will be liable not under the law but by usage of business known to both parties at the time of the employment and with reference to which the contract of agency was made¹⁷. An agency is determined by the principal's refusal to indemnify the agent in the future in a speculative business committed to that agent, the principal thereafter cannot claim to be entitled to the ultimate benefit accruing to the agent out of the business¹⁸.

Money paid by a debtor to a banker to the credit of a customer's account at that customer's request, in mistake of fact, may be recovered unless the banker has paid over the money to his customer or has altered his position in relation to his customer to his detriment¹⁹. A man, who gives an order to his agent to pay a creditor can afterwards revoke that order; but where money has been placed in the hands of the agent for payment of an existing debt, and the agent informs the creditor that he has the money in his hands for payment of that debt, the money cannot be recovered. Where, however, after such payment to the agent the creditor has not been informed or the agent has not taken any burden on himself, the authority of the agent to pay may be revoked²⁰. It may also be recovered from the agent if it has been

¹⁷ *Read v. Anderson*, 13 QBD 779 : (1881-85) All ER Rep 1104.

¹⁸ *Harihar v. Kesho Prasad*, 93 IC 454, 605.

¹⁹ *Kerrison v. Glynn Mill*, 81 LJKB 465 : (1911-13) All ER Rep 417.

²⁰ *Henderson v. Rothschild*, 33 Ch D 459.

paid under a mistake of fact or after failure of consideration, but it cannot be recovered back from the agent if he has paid it to the principal or done something equivalent to payment to him¹. Upon a sale by auction the vendor cannot, after a lot has been knocked down, revoke the authority of the auctioneer².

205. Compensation for revocation by principal or renunciation by agent.—Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

The section.—By this section “the principal is bound to make compensation to the agent, whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent”³. “The principal who, without reasonable cause, revokes the authority before the expiration of the agreed period, refuses to perform his part of the contract (S. 39) and prevents the agent from performing his part (Ss. 53, 75); he accordingly becomes bound to compensate the agent for any loss or damage sustained by him in consequence of the non-performance..... Neither this section nor the next covers the case in which, no period for the continuance of the agency being fixed, there is an implied contract that it shall continue until the business connected with it is completed”⁴. Where an agent, employed for an agreed commission to sell lands at a given price, succeeds in finding a purchaser at the stipulated price, but the principal declines to sell and rescinds the agent’s authority, the latter is entitled to sue for a reasonable remuneration for his work which will be the entire amount of the commission agreed for⁵. “A principal who wants to have a portion of his business transacted in Liverpool, or in any other town, engages an agent, and they enter into a mutual bargain, the one that he will employ no other agent, the other that he will act for no other principal,.....upon such an agreement as that, surely, unless there is some special term in the contract that the principal shall continue to carry on the business, it cannot for a moment be implied as a matter of obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent and the commission that he may receive.....in a contract of that kind

1 *Pollard v. Bank of England*, LR 6 QB 623, 630, cited in *Taylor v. Metropolitan Ry*, (1906) 2 KB 55, 63; *British A. C. Bank v. British Bank*, (1926) 1 KB 328; (1925) All ER Rep 486.

2 *Day v. Wells*, 30 Beav 220.

3 *Vishnucharya v. Ramchandra*, 5 B 253, 256.

4 C. & S. 490.

5 *Prickett v. Badger*, 1 CBNS 296.

there ought to be some special obligation, otherwise the natural reading of such a contract would be that as long as the principal chooses to carry on his business, and as long as he chooses, as here, to carry on that portion of the business which consists of sale of coals at the particular port, he shall be bound to employ the person with whom he has agreed as his agent for such sales, but that he shall be at liberty, when he likes to put an end to that business, to do so"⁶. When an agent is employed to sell goods on commission there is no implied contract binding the principal to supply the agent with goods⁷. Where a person is appointed the sole agent "for all time" there is no undertaking to carry on the business for their joint lives⁸.

Sufficient cause.—"Incapacity, physical or mental, on the part of the agent⁹, or want of the reasonable diligence or skill required by sec. 212, or misconduct in general, may constitute sufficient cause for dismissing him..... The acceptance of a bribe is good ground for dismissing an agent, it also entails the loss of the remuneration which would otherwise be due to him"¹⁰. There is no fixed rule of law defining the degree of misconduct which will justify the dismissal of a servant. Misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal and that is a question of fact¹¹.

206. Notice of revocation or renunciation.—Reasonable notice must be given of such revocation or renunciation ; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

The section.—The section means that when there is no express or implied contract that the agency should continue for any fixed period, reasonable notice must be given of the revocation or renunciation of the agency. The words "such revocation or renunciation" do not refer to S. 205. The reference is rather to S. 203. Ss. 204 and 205 form exceptions to the general rule set out in S. 203¹². Agreement in suit was construed to be revocable. Commission payable by the principal to the agent ceases on the termination of the agency¹³.

Notice of revocation.—"There has not as yet been established in India any custom regulating notice required to be given on either side of a wish

6 *Rhodes v. Forwood*, 1 AC 256, 272 : (1874-80) All ER Rep 476, cited in *Shivlal v. Manekji*, 54 B 510.

7 *Official Assignee v. Frank Johnson*, 59 MLJ 839 ; *Turner v. Goldsmith*, (1891) 1 QB 544 : (1891-94) All ER Rep 384.

8 *Shivlal v. Manekji*, 54 B 510.

9 *Cuckson v. Stones*, 28 LJQB 25 : (1843-60) All ER Rep 384 ; *Morrison v. Bell*, (1939) 2 KB 187.

10 *C. & S. 500 ; Boston Deep Sea Co. v. Ansell*, 39 Ch D 339 : (1886-90) All ER Rep 65.

11 *Clouston v. Corry*, 1906 AC 122, 129 : (1904-07) All ER Rep 685.

12 *Re Shaw Wallace & Co.*, 35 CWN 361.

13 *Sohrabji v. O. G. S. L. Assocs.*, 1944 B 166.

to terminate the engagement between employer and employee and every case has to be decided on its own merits and the consideration of the special circumstances attending it." One month's notice may, in the absence of special stipulation, be regarded as sufficient¹⁴. The employee is not entitled to more than a month's pay in lieu of notice, because a month's leave is also due to him at the time¹⁵. A schoolmaster engaged by the month, in the absence of a special agreement, is entitled to a reasonable notice, i.e., to one month's notice¹⁶. But if not engaged by the month the rule of one month's notice which applies to menials does not extend to the case of a schoolmaster, a notice of 3 months would be more reasonable¹⁷. In case of dismissal of a servant all that the law requires is that he should be given a reasonable notice, what is a reasonable notice must depend on the particular facts of each case. Whether on account of his age or otherwise a servant who cannot perform his duty is not entitled to any notice before dismissal, there is no material difference between a servant who will not and one who cannot perform the duty for which he was hired¹⁸. Servants of the Crown hold office during the pleasure of the Crown, servants of statutory bodies do not, therefore cannot be summarily dismissed. Reasonable notice is necessary in the absence of stipulation as to notice¹⁹. As to the remedies of a servant wrongfully dismissed, see *Gulab v. P. Z. Bank*²⁰. If a servant be unable to perform the duties entrusted to him owing to repeated attacks of illness he must be held to have been guilty of wrongful conduct, so he is not entitled to a month's notice or pay in lieu thereof¹. In England apparently the rule is that a master may turn away a servant by giving him a month's warning or a month's wages, but this sum can be claimed not as wages but only as compensation². A clerk on a monthly salary is entitled to a month's notice before his dismissal, equally is the master entitled to one month's notice before he leaves service³. Even 15 days' notice has been regarded as sufficient to terminate a contract of service⁴. After all, what is a reasonable notice is a question which varies with the circumstances of each case⁵. Two years' notice of termination of agency was deemed reasonable. The appellate court will not interfere with a finding of the trial court as to what constitutes a reasonable period of notice⁶. In *Martin-Baker Aircraft Co. v. Canadian Flight Equipment*⁷, twelve months' notice was held to be reasonable.

14 *Green v. Cowles*, 146 IC 122; but see *Sukha v. Ram*, 1941 O 10.

15 *Lazarus v. DeSouza*, 146 IC 946.

16 *Maung Thein v. DeSouza*, 119 IC 740; *African Association v. Allen*, (1910) 1 KB 397.

17 *Nirod v. Kirtyananda*, 80 IC 308.

18 *Detaram v. Forbes*, 117 IC 778; *Chandra v. Burhwal Sugar Mills*, 33 ALJ 994.

19 *Balada v. Imperial Bank*, 1939 M 580.

20 1940 L 243.

1 *Chandra v. Burhwal*, 157 IC 362.

2 *Fewings v. Tindal*, 17 LJ Ex 18.

3 *Ralli Bros. v. Ambika*, 11 ALJ 104.

4 *Ganga v. Duni*, 78 IC 763; *Rala v. Baijnath*, 168 IC 697.

5 *Tatta M. v. Assanmal*, 29 IC 597, 600.

6 *Sohrabji v. O. G. Asce.*, 1944 B 166.

7 (1955) 2 QB 556.

207. Revocation and renunciation may be expressed or implied.—Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

208. When termination of agent's authority takes effect as to agent and as to third persons.—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

Illustrations

(a) A directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

1. The section.—The principal is bound by transactions entered into on his behalf by his agent, even though the authority of the agent had been terminated, provided third persons entering into such transactions with the agent had no notice of the revocation of his authority. As a general rule, except in the case of the death of the principal⁸, an agency is terminated in any of the ways mentioned in S. 201 when the fact becomes known to the agent or third persons.

2. When termination of the agent's authority takes effect.—The law has been thus succinctly stated. Where such a change occurs to the principal that he can no longer act for himself, e.g., on his death, insolvency or insanity, the agent whom he has appointed can no longer act for him. Change of status in the principal puts an end to the authority of the agent. Authority may be given to an agent in two ways. First, it may be given by some instrument, which of itself asserts that the authority is thereby created, such as a power of attorney. Secondly, an authority may also be created from the principal holding out the agent as entitled to act generally for him. As between the

⁸ See *Yonge v. Toynbee*, (1910) 1 KB 215 : (1908-10) All ER Rep 204, cited under s. 216 n. 3, end.

principal and the agent, the agency expires on the former's becoming to the latter's knowledge insane; but the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him; and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made on his behalf. Therefore, where the agent holds himself out as an agent, and a person dealing with him acts upon the principal's representation of the agent's authority without notice that it has been withdrawn, the principal cannot escape from the consequences of the representation which he has made, he cannot withdraw the agent's authority as to third persons without giving them notice of withdrawal⁹. If an agent functioning under a written authority of the principal holds himself out as such agent after the death of the principal and if persons competent to ratify his action after the death of the principal ratify the same in a legal manner, then the agent should be deemed to have acted within the limits of his authority and that he validly holds himself as the agent of the subsequent proprietors¹⁰. In such a case the agent is also personally liable for breach of warranty of authority. As has been observed, "where an agent represents that he has authority to do a particular act, and he has not such authority (e.g., by death or insanity of the principal), and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty that he had the authority which he professed to have"¹¹. The section shows that the revocation of authority of an agent may take effect in so far as third persons are concerned, at a point of time different from the moment when it takes effect with regard to the agent himself. As to the agent the revocation takes effect from the time when it was made known to him, as to third persons, when it was made known to them and not before; until revocation is so made known it is inoperative. Express or actual notice is not necessary; it is sufficient to establish that the person had knowledge that the authority of the agent has been revoked¹². Where plaintiffs have dealings with a firm of *H* which is managed by his *gomasta*, on the death of *H*, the termination of the authority of the *gomasta* does not take effect as regards the plaintiffs until they come to know of his death¹³. An agency being determined by the death of the principal, an agent cannot recover from the administrator commission for work done by the agent after the principal's death and entrusted to the agent by the deceased principal¹⁴. This and the following sections have no application to the authority of pleaders to appear in court and act for their clients. The appointment of a pleader ceases to have force when the client dies¹⁵.

9 *Drew v. Nunn*, 4 QBD 661, 666 : (1874-80) All ER Rep 1144.

10 *S. S. Bus Service v. P. Gopal*, AIR 1971 Mad. 434, 435.

11 *Yonge v. Toynbee*, (1910) 1 KB 215, 231, 227 : (1908-10) All ER Rep 204.

12 *Dasarath v. Brojo Mohan*, 18 CLJ 621.

13 *Ebrahim v. Chuni Lal*, 13 Bom LR 264.

14 *Campanari v. Woodburn*, 15 CB 400.

15 *Radhikai v. Mangia*, 153 IC 251.

An agent retains his powers before he receives notice of revocation of his authority and can, before the receipt of such notice, by virtue of the powers, enter into contracts which are binding (on the assignee from the principal)¹⁶. Where a principal residing in Petrograd employed *H* his agent in London to carry on his business and, after a time, terminated the agency, after which *H* purported to enter into a contract on behalf of the principal, the principal was bound¹⁷. It has been laid down in *Mohendra v. Kali*¹⁸ that if the authority of an agent to admit execution of a document is revoked before registration, but such revocation is not known either to the grantee of the document or to the Registering Officer, the document is not invalidated, although it is registered after the revocation of his authority¹⁹. In *K. Bivi Ammal v. A. Nadar*²⁰, certain mortgages were challenged on the ground that the appellants had cancelled the power of attorney sufficiently prior to the date of the execution of mortgages. Neither the agent nor the mortgagees knew about the cancellation of the power of attorney. Held, that the mortgages executed by the agent were valid and binding on the appellants. A master is bound for goods obtained by his duly accredited agent from a tradesman who has no notice of the revocation of the agent's authority to act¹.

209. Agent's duty on termination of agency by principal's death or insanity.—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

1. Agent's duty on termination of agency.—An agency is terminated by the death of the principal (S. 201). The provision in this section that the agent must take reasonable steps does not indicate that the agent continues to be the agent that he was before the death of the principal. It is plain from this section that an agency is determined by the death of the principal or the agent². Where an agent acting within the scope of his authority enters, after the principal's death, into a contract for the purchase of goods to keep the principal's manufactory going, this is a reasonable step³. In *Ebrahim v. Chunilal*⁴, it has held that even assuming that the agent's authority was terminated by the death of the principal yet it was not terminated so far as

16 *M. & E. Bank v. Gladstone*, LR 3 Ex 233.

17 *Trueman v. Loder*, 11 A & E 589 : 113 ER 539.

18 30 C 265.

19 *Maung La v. Po*, 7 R 42.

20 AIR 1970 Mad 76.

1 *Summers v. Solomon*, 26 LJQB 301.

2 *Madhusudan v. Rakhal*, 43 C 248, 254.

3 *Moosaji v. Administrator-General, Bengal*, 3 Lah LJ 265.

4 33 B 302; see *Anand v. Dinshaw*, 1942 O 417.

creditors were concerned who were not aware of the death of the principal, and also that an acknowledgment of debt given by the agent after the principal's death to creditors who were unaware of the fact was a valid acknowledgment under S. 19 of the Limitation Act. Such an acknowledgment by the agent constituted a reasonable step for protection and preservation of the interest of the principal. When property has been in the possession of an agent during the subsistence of the agency, legal possession of the property cannot be deemed to have passed back to the principal the moment the agency has terminated⁵.

210. Termination of sub-agent's authority.—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Agent's Duty to Principal

211. Agent's duty in conducting principal's business.—An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B* the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

1. The section.—It is the duty of the agent to carry out the business entrusted to him in accordance with the directions given by the principal. In the absence of such direction the agent must follow the custom prevailing in the business of the kind at the place. Any departure from the instructions or the custom the agent makes at his own risk. The breach of a contract by the agent can give no right of action to the principal, where the contract is illegal or void, so that its performance could not have been enforced by any legal proceeding⁶. A principal has three rights against his agent who fails in his duty, (i) to recover damages for want of skill and care and for

⁵ *Abdul v. Bajan*, 1944 M 221.

⁶ *Cohen v. Kittel*, 22 QBD 680, approved in *Cheshire Co. v. Vaughan & Co.*, (1920) 3 KB 240; 89 LJ KB 1168; 123 LT 487.

An agent retains his powers before he receives notice of revocation of his authority and can, before the receipt of such notice, by virtue of the powers, enter into contracts which are binding (on the assignee from the principal)¹⁶. Where a principal residing in Petrograd employed *H* his agent in London to carry on his business and, after a time, terminated the agency, after which *H* purported to enter into a contract on behalf of the principal, the principal was bound¹⁷. It has been laid down in *Mohendra v. Kali*¹⁸ that if the authority of an agent to admit execution of a document is revoked before registration, but such revocation is not known either to the grantee of the document or to the Registering Officer, the document is not invalidated, although it is registered after the revocation of his authority¹⁹. In *K. Bivi Ammal v. A. Nadar*²⁰, certain mortgages were challenged on the ground that the appellants had cancelled the power of attorney sufficiently prior to the date of the execution of mortgages. Neither the agent nor the mortgagees knew about the cancellation of the power of attorney. *Held*, that the mortgages executed by the agent were valid and binding on the appellants. A master is bound for goods obtained by his duly accredited agent from a tradesman who has no notice of the revocation of the agent's authority to act¹.

209. Agent's duty on termination of agency by principal's death or insanity.—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

1. Agent's duty on termination of agency.—An agency is terminated by the death of the principal (S. 201). The provision in this section that the agent must take reasonable steps does not indicate that the agent continues to be the agent that he was before the death of the principal. It is plain from this section that an agency is determined by the death of the principal or the agent². Where an agent acting within the scope of his authority enters, after the principal's death, into a contract for the purchase of goods to keep the principal's manufactory going, this is a reasonable step³. In *Ebrahim v. Chunilal*⁴, it has held that even assuming that the agent's authority was terminated by the death of the principal yet it was not terminated so far as

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1 *Summers v. Solomon*, 26 LJQB 301.

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3 *Moosaji v. Administrator-General, Bengal*, 3 Lah LJ 265.

4 35 B 302; see *Anand v. Dinshaw*, 1942 O 417.

creditors were concerned who were not aware of the death of the principal, and also that an acknowledgment of debt given by the agent after the principal's death to creditors who were unaware of the fact was a valid acknowledgment under S. 19 of the Limitation Act. Such an acknowledgment by the agent constituted a reasonable step for protection and preservation of the interest of the principal. When property has been in the possession of an agent during the subsistence of the agency, legal possession of the property cannot be deemed to have passed back to the principal the moment the agency has terminated⁵.

210. Termination of sub-agent's authority.—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Agent's Duty to Principal

211. Agent's duty in conducting principal's business.—An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B* the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

1. The section.—It is the duty of the agent to carry out the business entrusted to him in accordance with the directions given by the principal. In the absence of such direction the agent must follow the custom prevailing in the business of the kind at the place. Any departure from the instructions or the custom the agent makes at his own risk. The breach of a contract by the agent can give no right of action to the principal, where the contract is illegal or void, so that its performance could not have been enforced by any legal proceeding⁶. A principal has three rights against his agent who fails in his duty, (i) to recover damages for want of skill and care and for

⁵ *Abdul v. Bajan*, 1944 M 221.

⁶ *Cohen v. Kittel*, 22 QBD 680, approved in *Cheshire Co. v. Vaughan & Co.*, (1920) 3 KB 240 : 89 LJ KB 1168 : 123 LT 487.

disregard of the terms of agency; (ii) to obtain an account and payment of secret and illicit profits which have come to the hands of the agent; and (iii) to resist the agent's claim for commission and indemnity by showing that the agent acted as a principal⁷.

2. Agent's duty to follow instructions.—The agent is liable for conducting business in disregard of plaintiff's direction⁸. Where an agent was given goods to be warehoused at a particular place, but he warehoused them elsewhere, where, without any negligence on his part, they were destroyed, he was liable for the loss of the goods. If an agent elects to deal with the property entrusted to him in a way not authorised by the principal, he takes upon himself the risk of so doing, except where the risk is independent of his act and inherent in the property itself⁹. Where an auctioneer sells certain furniture to a person on his giving a bill of exchange for the amount, the auctioneer is liable for not selling the furniture for ready money¹⁰. Where goods are entrusted with an agent for sale for ready money, but the agent delivers the goods to the vendor without payment, and the price is not realised, the conduct of the agent amounts to a breach of contract and he is liable for the value of the goods¹¹. Where the principal instructs the agent to purchase for him 50 bales of cotton, but the agent, being instructed by other principals, makes a contract in his own name for 300 bales, there is no such contract as the agent was authorised to make, therefore there is a total failure of consideration and the principal is entitled to recover back the money¹². Where the agents have definite instructions from their principals not to send certain goods by rail, the agents are bound to carry out those instructions, when they act contrary to those instructions they cannot make the principals liable for the railway freight¹³. The principal is not bound by the unauthorized acts of the agent but is bound where the authority is substantially pursued, e.g., a purchase by an agent of 94 bales of cotton when 100 bales are ordered is a substantial compliance with the order¹⁴. The question of deviation is in every case a question of degree. The master would be liable even though the servant is guilty of a deviation or a failure to perform in the strictest manner¹⁵. The principal may recover money paid to his agent on the failure of the latter to perform the act within the time stipulated or fixed by usage¹⁶.

An agent who negligently omits to comply with the clear instructions of his principal must be regarded as guilty of gross negligence¹⁷. The agent is bound to conduct the business of his principal according to the directions

⁷ *Manek v. Jwala*, 1947 B 135

⁸ *Jagannadha v. Narasimham*, 1950 O. 241.

⁹ *Lilley v. Doubleday*, 7 QBD 510, foling *Davis v. Garrett*, 6 Bing. 716 : (1824-34) All ER Rep 286.

¹⁰ *Ferrers v. Robins*, 2 CM & R 152.

¹¹ *Stearine K. F. G. Co. v. Heintzmann*, 17 CBNS 56.

¹² *Bostock v. Jardine*, 3 H & C 700.

¹³ *Mathra Das v. Kishen Chand*, 86 IC 567.

¹⁴ *Johnston v. Kershaw*, LR 2 Ex 82.

¹⁵ *Dayaram v. Sham*, 1946 C 163.

¹⁶ *Fletcher v. Marshall*, 15 M & W 755 : 153 ER 1055.

¹⁷ *Punjab National Bank v. Diwan Chand*, 134 IC 577.

given by the principal and if he appoints a sub-agent he is bound to exercise the same amount of discretion as an ordinary prudent man would exercise¹⁸. An agent is bound to collect outstanding due to the principal, if directed. Independently of an agreement or custom, the principal is not bound to pay any commission for such collection¹⁹. Where the debtor to the principal is financially embarrassed, the duty of the agent is to do his best to collect all he can under the circumstances. If the agent's authority be not limited, he can realise what he can get in cash and give time for the payment of the balance. The principal cannot realise this balance from the agent without proving that he could have got more in cash and that as the result of his negligence the principal has suffered loss²⁰. Where it can be shown that the loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of his business, the agent is liable¹. Where plaintiff consigns certain goods on commission through the defendants for sale in England and the defendants refuse to carry out the instructions, the plaintiff's remedy is not by a suit for accounts but by way of damages according to the market rate prevailing in England on the date when the defendants refused to carry out the instructions². A servant is not bound to obey an unlawful order of his master, but there must be an immediately threatening danger by violence or disease to the person of the servant before an order to remain in a zone of danger can be held to be unlawful³. A servant cannot be dismissed for incapacity to perform the services contracted for where the disability is not permanent. Where there is a grave risk of life of the servant at the place of his office and the servant applies for transfer, an order on him to remain at his post is not lawful⁴. When an agent is authorised to pay an amount towards the total amount of the bond, the authority extends to his paying an amount towards the interest due on the bond ; where the authority is specific, that is to say, where the agent is authorised to pay only towards the principal, the agent will not be justified in paying towards interest⁵. A principal is precluded from holding an agent liable in damages for acting contrary to his instructions when there has been acquiescence in the breach on the part of the principal⁶.

3. Agent's duty to follow custom.—“Brokers employed to sell goods are bound to do so in the usual way, and if it is usual to send to the seller an estimate of value, in order that he may be enabled to fix a reserve price, they ought to do so ; and whether it is so or not, they are bound for their own guidance to make a careful estimate of the value ; and if they sell, even

18 *Beni v. Narain*, 129 IC 287.

19 *Karuthan v. Chidambaram*, (1938) 2 MLJ 79.

20 *Gokalchand v. Nandram*, 43 CWN 87 PC.

1 *Mukerji v. Municipal Board, Benares*, 46 A 175, 190.

2 *Wali v. Khoja I. Trading Co.*, 150 IC 464.

3 *Bouzourou v. Ottoman Bank*, 124 IC 587.

4 *Ottoman Bank v. Chakarian*, 1930 AC 277.

5 *Karuppan v. Maruthanayagam*, 51 MLJ 472.

6 *Ramaswamy v. Alagappa*, 28 MLJ 199, commented in *Karuthan v. Chidambaram*, (1938) 2 MLJ 79.

by public auction, at a price much below the fair value, then not having made such an estimate will be evidence of negligence and if a loss is caused thereby, they will be liable." It is not a question merely of price or value but whether they were guilty of negligence in not getting a better price, and not using the ordinary care to do so⁷. An agent can mix up the goods of his principal, which he is instructed to sell, with other goods with which his principal has nothing to do, if there be a mercantile usage⁸. According to the custom of trade in Bombay, when a merchant requests or authorises a firm to buy and send goods to him from Europe at a fixed price, and no rate of remuneration is specially mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturers, and it makes no difference that the firm receives a commission or trade discount from the manufacturers with or without the knowledge of the merchant⁹. A *pakka adatia*, though a commission agent, is *qua* the persons entering into forward contracts in the position of a principal. He is liable to both parties for the performance of the contract. The position of a *pakka arhatia* is analogous to that of a *del credere* agent who incurs only a secondary liability towards the principal, and whose legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of insolvency or something equivalent. He is himself vitally interested in the performance of the contract that has been entered into through him. He can take steps to prevent reckless speculation¹⁰. He does not bring any contractual relationship between the two parties. He may allocate the order to himself¹¹. He is entitled to demand margin before he enters into any further transaction¹². In fact the position of a *pakka adatia* is that of a principal, so neither the *pakka adatia* nor the party can sue the other¹³. As to custom determining the incidents of *pakka adatia* dealings see the cases noted below¹⁴. The usage termed the *pakka adatia* system involves a material departure from the ordinary relations between a principal and his agent¹⁵. The term is a compendious description of a body of local usages which vary from market to market¹⁶.

It is well established that the *pakka adatia* has no authority to pledge the credit of the upcountry constituent to the Bombay merchant and there is no privity of contract as between the upcountry constituent and the Bombay merchant. The *pakka adatia* is entitled to substitute his own goods towards the contract made for the principal and buy the principal's goods on his

7 *Solomon v. Barker*, 2 F & F 726.

8 *Panna v. Daulatram*, 122 IC 85.

9 *Beier v. Chotalal*, 30 B 1, 23.

10 *Meghraj v. Anup*, 34 ALJ 475, see *Gopal v. Mulraj*, 173 IC 444; *Baksi v. Jasroop*, 1948 N 173.

11 *Ganpat v. Kher*, 1937 L 581.

12 *Sakarbhui v. Ramnik*, 1932 M 328.

13 *Sagarmal v. Bishambhar*, 1947 A 14.

14 *Bhagwandas v. Kanji*, 30 B 205; *Bhagwandas v. Burjorji*, 45 IA 29; *Kedarmal v. Surajmal*, 33 B 364.

15 *Chandulal v. Sidhruthrai*, 29 B 291, 299; *Rugnath v. Ram*, 160 IC 6.

16 *Daya v. Sham*, 1946 C 163.

personal accounts. In other words, the *pakka adatia* is not the agent of his constituent but he is acting as a principal as regards his constituent and not as a disinterested middleman to bring two principals together¹⁷. The legal position has been explained by the Bombay High Court in *Bhagwandas Naro-tamdas v. Kanji Deoji*¹⁸, and affirmed by the Judicial Committee in *Bhagwandas Parasram v. Burjorji Ruttonji Bomanji*¹⁹.

"The only difference then between the relationship of a *pakka adatia* and his constituent, on the one hand, and that of a broker personally liable on the contracts he enters into on orders received and his client, on the other, is that in the latter case the broker enters into the contract as agent for the client, he himself also being personally liable to the person with whom he contracts, while the *adatia* does not make the contracts with third parties as agent but as principal, the constituent having no right to be brought into contract with the third parties"²⁰. As to the incidents of the *kacchi adatia* system, see *Fakirchand v. Doolub*¹.

As to custom fixing the incidents of forward contracts in the Bombay silver market, the parties acting sometimes as *pakka adatias* and sometimes as *kacchi adatias*, see *Abhraham v. Sarupchand*². The position of a *kacchi adatia* is that of an agent with personal liability and different from that of a *pakka adatia*³. A *pucca adatia* who has the possession of the goods of the constituent for sale and export and who has an export license in his own name does not act beyond the scope of his authority if he purchases the goods himself without intimating his constituent, within the limits of price indicated by him. The constituent is entitled to recover from the price of the goods at the rate at which he was willing to sell to a third party⁴. A *pucca adatia* may deal with his constituent in two capacities: (a) as agent and (b) as principal. As agent he is bound to carry out the directions of his constituent⁵.

4. Measure of damages.—The measure of damages, when an agent sells goods consigned to him for sale below the limits placed upon them by the principal and without being able to justify the sale by the terms of the contract, is the loss which the principal sustains by the sale made by the agent in breach of his duty, and not the difference between the price fixed by the principal and price which the goods actually realised; if the principal has suffered no loss he can only ask for nominal damages⁶.

17 *Shivanarayan v. State of Madras*, AIR 1967 SC 986.

18 1906 ILR 30 Bom 205.

19 AIR 1917 PC 101 : 45 IA 29.

20 *Manilal v. Radhakissan*, 45 B 386, 413; *Ganpat v. Kehr*, 18 Lah. 683.

1 7 Bom LR 213; *Devshi v. Bhikamchand*, 29 Bom LR 147.

2 42 B 224.

3 *Harcharan v. Jai*, 1940 A 182.

4 *N. Bhaironbux & Co. v. Kashi Ram*, AIR 1973 Raj 271.

5 *Ibid*.

6 *Manchubhai v. Tod*, 20 B 633; *Chelapathi v. Surayya*, 12 MLJ 375.

212. Skill and diligence required from agent.—An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses ; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations

(a) A, a merchant in Calcutta, has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as e.g., by variation of rate of exchange—but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

1. Skill and diligence required from agent.—Where a skilled labourer, artisan or artist, is employed, there is on his part an implied warranty that he is of skill reasonably competent for the task he undertakes and an express promise is not necessary. When the person employed is found to be incompetent, the employer is not bound to employ him to the end of the term. Misconduct in a servant is a justification of his discharge. The failure to afford the requisite skill which was expressly or impliedly promised is a breach of legal duty and therefore misconduct. Where, however, there is no representation of ability and skill, and person is employed in a task demanding their exercise, he undertakes no responsibility for the efficient discharge of his duty'. Where a person is employed with knowledge of his qualifications and he does what he thinks to be the best, there can be no question of negligence unless he does anything which any reasonable man with his

qualifications would have omitted to do⁸. A person who undertakes for reward to act as a skilled agent is bound to bring reasonable and ordinary care and knowledge to the performance of his duty as skilled agent⁹. He ought not to rely on the statement of others¹⁰. Commission agents should act as prudently and wisely in arranging business on their clients' behalf as they would do when acting on their own behalf¹¹. An agent is guilty of negligence if he does not make a contract as he is employed to do, in such a form as could be enforced, though he acts in conformity with the custom of the market; such a custom is not valid because it is both unreasonable and illegal¹². An exception clause in a charterparty agreement will protect the shipowners from the consequence of negligence¹³. Once a master has condoned any misconduct on the part of the servant, he cannot claim a right to dismiss the servant or impose a fine for the offence¹⁴, or by suspending him refuse to pay him wages¹⁵.

Sections 211 and 212 make it clear that in the case of the agent's negligence he is liable to make good the damage directly arising from his neglect, but not indirectly or remotely caused by such neglect or misconduct¹⁶. Where documents relating to goods sold are negotiated through a Bank and the buyer clears the documents on paying the price to the Bank together with 'C' Form under the Sales Tax Act and the Bank in forwarding the price to seller omits to forward the 'C' Form with the result that the seller is required to pay sales tax at a higher rate thus incurring a loss of Rs. 900, the seller can recover this amount from the Bank¹⁷.

An advocate in the exercise of his profession is bound to exercise reasonable skill and prudence but he is not expected to be infallible. If the construction put by an advocate on a compromise decree be not so unreasonable that no skilled advocate would advise his client in that sense, the client's case against his advocate will fail¹⁸. A refund is claimable when a pleader through neglect does not appear; but where a pleader suddenly falling ill engages a Barrister to look after his case, but the client refuses to get his work done by the Barrister, the pleader has done all that could possibly be expected from him, so on his death his representatives are not liable to refund the fees to the client¹⁹. The hospital authority is not liable for the negligence of the members of its professional²⁰ or nursing¹ staff. A *tahsildar*

8 *Chinnathamby v. Kuddus*, 94 IC 80, 862.

9 *Lee v. Walker*, LR 7 CP 121.

10 *Sitarampur Coal Co. v. Colley*, 13 CWN 59.

11 *Nandram v. Gokal*, 149 IC 688.

12 *Neilson v. James*, 9 QBD 546.

13 *Svenssons v. C. S. S. Co.*, (1932) 1 KB 490 : (1931) All ER Rep 37.

14 *Dist. Council v. Vithal*, 1941 N 125 : *Gidugu v. Krishna*, 1942 P 176.

15 *Padina v. A. M. Borough*, 1943 B 9.

16 *Pannalal v. Mohanlal*, AIR 1951 SC 144.

17 *R. J. Mohamed v. Indian Bank*, AIR 1975 Mad 220.

18 *Saw v. Halkar*, 9 R 575.

19 *Devi Parshad v. Ram*, 33 IC 993.

20 *Marshall v. L. C. C.*, (1935) 1 KB 516.

1 *Strangways-Lesmere v. Clayton*, (1936) 2 KB 11.

appointed by a landlord is bound to take all precautions which an ordinary prudent man of business would take in managing the affairs of his own. If he fails to do so he will be liable for the loss occasioned by his default. In a suit for accounts against the *tahsildar*, a claim for damages arising from the laches of the agent may be included². Where goods bought by the plaintiff were sent to a wrong station by the vendor by means of railway, the vendor in contracting with the railway company contracted as the plaintiff's agent and therefore would be liable if guilty of negligence³. An agent sending goods by rail in an open truck at the owner's risk is guilty of negligence and liable in damages, the measure of such damages is the difference between the price of the goods in their undamaged condition and their market value at the time when they reached destination⁴. It is the duty of an agent entrusted with the investment of moneys belonging to his principal to have a proper valuation made of the property on the security of which the investment is made. If he chooses to rely mainly on his own general knowledge he does so at his own risk and will be liable for loss which the principal may suffer. If the security was originally adequate the agent will not be liable for an accidental diminution in the value *e.g.*, by a slump⁵. Where the defendant undertakes to collect money on behalf of the plaintiff and pay certain debts out of the collection but fails to do so, his liability is limited to the payment of interest, it does not include the costs of suit which were regarded as too remote⁶. A servant is liable to pay to the master the value of goods lost when he fails to establish that he took every possible care and caution and was not guilty of negligence⁷. In *Vishinji v. Jasraj*⁸, it has been laid down that the case of an agent is different from that of a bond-debtor or purchaser, the agent is not bound to find out his principal and pay him the amount due as damages for negligence on the agent's part.

2. **Liability to compensation.**—There can be no doubt that an agent who is guilty of negligence must make compensation to his principal in respect of the direct consequences of his neglect⁹. The agent may, however, stipulate by express agreement for exemption from the consequences of his act or neglect¹⁰. In the absence of the English practice of employing architects and engineers with full power of supervision, the liability for defect in the construction of a building has to be determined with reference to the relationship of master and servant. In order to charge an engineer with liability, it must be shown that the defects in the building are due to want of skill, negligence or misconduct on his part¹¹. An agent being authorised

2 *Ramesh v. Easin*, 52 IC 71.

3 *Kishan Dayal v. Har Prasad*, 7 ALJ 732.

4 *Surajmal v. Fateh*, 120 IC 529 : *Venkata v. S. of S.*, 1937 AC 248.

5 *Shaw v. Jack*, 137 IC 531 PC.

6 *Rangasamy v. Venkatarama*, 28 IC 635.

7 *Abdulla v. Mahomed*, 28 Bom LR 500.

8 50 IC 146.

9 *Suraj Mal v. Fateh Chand*, 11 Lah 227.

10 *Austin v. Manchester Ry.*, 10 CB 454.

11 *Nagendra v. Nagendra*, 97 IC 200.

to do an act, which act is in itself an imprudent one, and which the principal ought never to have authorised to be done, is not to be made liable for it when the loss is occasioned¹². An agent not guilty of negligence is not liable. Freight is the reward for the safe conveyance and delivery of goods. A domestic animal is not cargo, so if it dies in transit, the agent is not guilty of negligence¹³. An agent acting within the scope of his agency and with reasonable care, and honestly in the interest of the company, is not personally liable for losses which the principal may suffer by reason of his mistake or error in judgment¹⁴. An agent responsible for the loss of public money, otherwise than by act of God or the king's enemies, is liable to make good the loss when he is stabbed and robbed of the money¹⁵. A right to damages for conversions arises in favour of the principal on each occasion that an agent sells securities deposited with him by the principal¹⁶. A gratuitous agent is liable for gross negligence, but this means that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description¹⁷.

3. **Limitation.**—Under Art. 90 a suit by a principal against an agent for neglect or misconduct should be brought within a period of 3 years from the time such neglect or misconduct became known to the plaintiff. The knowledge of these acts of misconduct can only be known to the principal when he gets the books of account¹⁸. The refusal by an agent to render account to the principal, as mentioned in Art. 89, must be an express refusal on a definite date and not merely a virtual refusal to be inferred from the conduct of the agent. A suit for rendition of accounts against the heirs of a deceased agent with a direction for payment out of the estate of the agent in the hands of the heir, however, is governed by Art. 120 and limitation begins to run from the agent's death¹⁹. A suit by a principal against the agent for the recovery of money lent by the agent to persons to whom he was not authorised to lend is a suit for an ordinary money account and is governed by Art. 89²⁰. A claim against a pleader for account will be barred under Art. 89 on the expiry of 3 years¹. To a suit by the principal against the agent to compel the latter to render an account to profits received by him by carrying on,

12 *Overend & Gurney v. Gibb*, LR 5 HL 480, 502.

13 *Maharaja of Pithapuram v. Thos. Cook & Son*, 1936 M 977.

14 *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch 392, 422; *Rajaram v. Abdul*, 31 IC 450.

15 *Gujjar v. G. G.*, 1942 Pesh 33.

16 *Solloway v. Mc. Lauglin*, 1938 AC 247.

17 *Giblin v. Mc. Mullen*, LR 2 PC 317, 336 sq.

18 *Palaniappa v. P. M. R. M. Firm*, 25 IC 136; *People's Bank v. Hargopal*, 1936 L 268.

19 *Fatma v. Imtiaz*, 13 IC 930, 935; *Girraj v. Rani Raghubir*, 31 A 429; but Art 115 or 116 has been held to apply according as the contract is registered or not, *Jhapajannessa v. Rash Behari*, 16 CLJ 288. But it has also been held that the suit must be brought within 3 years under Art 89, *Nobin v. Chandra*, 21 CWN 97; *Sharashibala v. Chuni*, 26 CWN 320; *Bikram v. Jadab*, 1935 C 817.

20 *Muthiah v. Alagappa*, 41 M 1.

1 *Rajah Parthasarathi v. Turlapati*, 47 MLJ 483.

on his own account, business similar to that of the principal, Art. 62 or 90 applies². If the appointment of the agent be by a registered instrument, and the suit be for compensation for a breach of contract, Art. 116 applies. Where the suit is not merely for an account but is a suit to enforce in the principal's favour the charge created to secure the moneys which might be found due from the agent to his principal, Art. 132 applies³. Where an agent is bound to render accounts at fixed periods, there is a cause of action for accounts at the end of each period. An agent is not bound to render accounts for a period longer than 6 years before suit under Art. 116⁴. An agent's liability is to his principal to render an account of sums received by him, the account is one and indivisible, and he cannot plead limitation as to any particular item as against his principal⁵. The above Articles which are all of the Act of 1908 have since been renumbered.

213. Agent's accounts.—An agent is bound to render proper accounts to his principal on demand.

1. **The section.**—The principle is well established that an agent entrusted with money or goods by a principal, to be applied on his principal's account, cannot dispute the principal's title unless he proves a better title in a third person, and that he is defending on behalf of and with the authority of the third person. The same principle controls the relation of bailor and bailee. As between the principal and the agent there is a contractual relation as well as a fiduciary relation, one of the contractual terms is that the agent should render an account to the principal of his dealings with the property entrusted to him. This obligation cannot disappear except by the transfer of the contractual right by novation or operation of law; and it may well subsist, notwithstanding that the property belongs to some one other than the principal⁶. An agent cannot challenge the title of the principal to receive money. The agent is liable to account even when he is under suspicion⁷. An agent, like a bailee, is estopped from setting up *jus tertii* against his principal, unless he defends with the authority of the *tertious*⁸. An agent appointed by an administrator of an estate as such is not liable to account to the person entitled to the estate and it makes no difference that the administrator obtained the grant as the attorney of the mother and the guardian of the person entitled⁹. A preliminary decree may be passed against agents of a joint family for rendition of accounts¹⁰. The agent is bound not

2 *Puran Mal v. Ford*, 41 A 635.

3 *Hafezuddin v. Jadu*, 7 CLJ 279; *Panchanan v. Kunja*, 9 CLJ 1; *Troilokhya v. Abinas*, 21 CLJ 459; *Madhusudan v. Rakhal*, 22 CLJ 552; *Jogesh v. Benode*, 14 CWN 122.

4 *Mathura v. Cheddu*, 39 A 355; *Jogesh v. Benode*, 14 CWN 122, Art. 115 held to apply.

5 *Nathubhai v. Devidas*, 12 Bom LR 951.

6 *Bhawani v. Misbahuddin*, 56 IA 170.

7 *Deva v. Lakhi*, 1942 P 108.

8 *Yadgar v. Muhammad*, 1936 N 71.

9 *Chidambaram v. Pichappa*, 30 M 243.

10 *Shankar v. Toshan*, 150 IC 151.

only to render an account but under S. 218 he is bound to pay over to principal what is found due on the taking of such account. The agent is entitled to claim an indemnity from his principal after rendering an account. In commission agency, before an agent can claim an indemnity, he has a duty to account. This obligation on the agent's part to account to his principal cannot be assigned¹¹. An agent is bound by the accounts submitted by him from time to time unless he can show that the statement was made unintentionally or by mistake¹².

Under the section a principal has a statutory right against his agent for an account but the agent has no such statutory right against the principal. Nevertheless there are cases where a suit for an account against the principal has been held to lie¹³. If the principal is found to owe money to the agent, it is not necessary for the agent to sue the principal, a final decree may be made in the principal's suit¹⁴. There is no hard and fast rule that under no circumstances can an agent call on his principal to render accounts. While the principal is under no statutory obligation to render accounts to his agent, he does become an accounting party in special circumstances or under trade usage or a definite contract¹⁵. An agent cannot bring a suit for accounts against his principal, but only for the balance due upon an account. The agent is liable alone to render accounts and the principal is not¹⁶. A pleader cannot maintain a suit for accounts against his client¹⁷. The agent is not entitled to institute a suit for accounts against his principal, his suit must be for the recovery of the specific amount alleged to be due to him from his principal. If in a suit brought by the principal against the agent an amount be found due to the agent, the agent is not entitled to a decree for the amount; he therefore cannot object to the withdrawal of the suit for accounts by the principal¹⁸. Under the section an agent is under a statutory obligation to render accounts to his principal, but the principal is under no counter statutory obligation of the same nature towards the agent. The mere fact that the principal did keep an account does not entitle the agent to demand it¹⁹. An agent has not always a right, whether special circumstances exist or not, to claim an account against his principal²⁰. A person meddling with another man's property or money is liable to render accounts, even though no contractual relations have been established¹.

11 *Ghisulal v. Gambhirmal*, 62 C 510.

12 *Shaw v. Picton*, 4 B & C 715 : 107 ER 1226.

13 *Gulabari v. I. E. Insce.*, 167 IC 929 referring to *Jessaram v. Ratanchand*, 78 IC 846; *Shepard v. Brown*, 7 LT 499; *Firm Kahn v. Baldev*, 1942 L 81; *Mahadevi v. Sankara*, 1940 M 504.

14 *Firm Kahn v. Baldev*, 1942 L 81; *Kanshi v. Dula*, 1938 L 723.

15 *Ram v. Asian C. Assurance*, 144 IC 505.

16 *Gopikisan v. Padamraj*, 37 IC 510; *Dev v. Gopal*, 1934 L 708; *Mirza v. K. Footwear*, 1946 A 489.

17 *Narmada v. Maharaj*, 1937 C 359.

18 *Hanuman v. Balmukand*, 104 IC 339; *Keshoram v. Joti Sarup*, 14 IC 15.

19 *Ghulam v. Faiz*, 78 IC 959.

20 *Jessaram v. Ratanchand*, 87 IC 846.

1 *Irish v. Sarejini*, 62 CLJ 88.

2. **Agent's duty to render accounts.**—Under this section an agent is bound to keep and render proper accounts to his principal on demand. As stated in *Pearse v. Green*², it is the first duty of an accounting party, whether an agent, a trustee or receiver, to be constantly ready with his accounts; he must further be always ready to explain them and produce vouchers³. It is the duty of an agent to preserve correct accounts of all his dealings, and loss of such evidence falls heavily upon him. The court will in such event presume everything most unfavourable to him. If an agent by his own conduct makes it impossible to ascertain the amount of profit realised, he will be disallowed his commission⁴. Every principal has a right to claim accounts from his agent, and an agent is bound to render accounts to his principal on demand provided the accounts between them are stated or settled⁵. Rendition of accounts means something more than merely sending the accounts and making over the account books to the principal; it means submitting and explaining the accounts to the principal and paying over to him the balance due, if any, from the agent⁶. When all the papers have been submitted, it is the principal's duty to call upon the agent to explain the accounts; on refusal, an account might be ordered by the court⁷. As to difference between account rendered and account stated see *Radhika v. Nandkumar*⁸. An agent who has drawn sums of money from the principal is clearly liable to account for the same⁹. An agent is liable to render accounts to the principal of all his dealings in the various transactions carried on by him as agent, but, in the absence of a special contract, the principal cannot be permitted to select capriciously a single transaction and claim the fruits thereof without an adjustment of the rights and liabilities of the parties in relation to other transactions¹⁰. Where an agent enters into a contract in his own name with a third person and brings a suit to recover damages for breach of the same and obtains a decree thereon, the principal cannot sue the agent for the recovery of the sum recoverable under the decree of the agent against the third person¹¹. It is open to the principal, before a suit is brought by the agent, to have commenced an action himself for breach of contract against the third person. He might have also, as pointed out in *Sadler v. Leigh*¹², intervened at any stage in the action which had been

2 Jac. & W. 135. An accounting party not rendering accounts must be charged with interest.

3 *Shib Chandra v. Chandra*, 32 C 719, 724; *Annoda v. Dwarka*, 6 C 754; *Madhusadan v. Rakhal*, 43 C 248; *Prasanna v. Burn & Co.*, 7 IC 270.

4 *Gray v. Haig*, 20 Beav 219.

5 *Manek v. Jwala*, 1947 B 135.

6 *Fatima v. Imtiaz*, 13 IC 930; *Shiva v. Hanuman*, 1938 P 392.

7 *Badri v. Kesho*, 184 IC 495.

8 *Radhika v. Nand*, 1944 N 7.

9 *Hurrinath v. Krishna*, 14 C 147 PC., see as to the form of a suit for accounts; see also *Degamber v. Kallynath*, 7 C 654.

10 *Godhanram v. Jaharmull*, 40 C 335.

11 *Udell v. Atherton*, 7 H & N 172; *Bristow v. Whitmore*, 9 HLC 391; 31 LJ Ch 467; 4 LT 622.

12 4 Camp 195.

commenced by his agent¹³. Where a minor comes to court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian and those have been applied for the benefit of the minor, the agent ought to be allowed those advances in taking the accounts¹⁴. A principal can sue an agent for a sum of money had and received on his behalf and may also bring a suit for accounts¹⁵. A landlord is entitled to a decree against his agent for the rent which owing to the agent's negligence has not been recovered¹⁶. There is no objection to joint and several accounting to joint and several principals¹⁷. An agent borrowing money on the principal's credit is bound to account. The fact that some of the creditors have given up their claims against the principal has nothing to do with the rights and liabilities as between the principal and the agent¹⁸. When an agent uses a debt due to his principal in order to obtain valuable property for himself, he in fact releases the debt on behalf of his principal and is liable to account for the same to the principal¹⁹.

Though an agent has no statutory right for an account from his principal, there may be special circumstances rendering it equitable for the principal to render account to the agent *e.g.*, where all the accounts are in the possession of the principal and the agent is unable to determine his claims for commission, or when his remuneration depends on the extent of dealings which are not known to him, or when the amount due to him cannot be ascertained without going into the account of the principal²⁰.

In order to maintain a suit for account the defendant must stand in some such relation to the plaintiff as that of an agent, or bailee, or receiver, or trustee, or partner¹. Where the relation between the parties is not that of principal and agent but that of landlord and tenant, a suit for account is not maintainable². An agent does not owe the same duty to the guarantor which he owes to the principal³, nor is a suit maintainable against a *pakka adatia*⁴. But it is maintainable where one of the persons liable acquires the interest of others also liable under the same contract⁵. A suit by a principal for accounts, on the allegation that the agent has not rendered any account, has manifestly an entirely different scope from that of a suit in which the principal alleges that the agent has rendered accounts but prays to have them reopened or to have liberty to surcharge and falsify

13 *Godhanram v. Jaharmull*, 40 C 335.

14 *Surendra v. Atul*, 34 C 892.

15 *Kishen v. Shamlal*, 109 IC 867.

16 *Hari v. Ram*, 1939 P 17.

17 *Charu v. Sital*, 1949 C 650.

18 *Kadiresan v. Ramanathan*, 102 IC 561; *Muthiah v. Alagappa*, 41 M 1.

19 *Birbal v. Kishori*, 12 ALJ 463.

20 *Narandas v. Papammal*, AIR 1967 SC 333.

1 *Gurditta v. Azan*, 122 PR 1881 refd. to in *Allahabad Bank v. Simla Banking Co.*, 114 IC 321.

2 *Bhekdhari v. Bodhisingh*, 27 C 663.

3 *Sree M. Mills v. Rati*, 1941 B 108.

4 *Dalip v. Dougar*, 1948 L 14.

5 *Shies v. Akbar*, 1948 A 58.

them on the ground of fraud or material error⁶. As between the principal and the agent a settled account will not be reopened unless fraud or undue influence is established⁷. The auditing of a company's accounts, no doubt, does, in the absence of proof of fraud or mistake in connection with the audit, close the accounts as between the shareholders and the directorate, but it does not preclude the company from calling upon its agent for rendition⁸. In a money claim by the principal against his agent, the agent is not entitled to set up a *jus tertii*⁹. A suit is not for an account unless the plaint asks for the taking of accounts¹⁰.

The principal is always entitled to have a final account taken between himself and his agent at the determination of the agency. If from time to time accounts have been taken and settled between the parties, the agent when rendering his final account will be entitled to rely upon those casual accounts and to urge that they ought to be accepted as *prima facie* correct¹¹. Where an agent files a suit for the recovery of an amount alleged to be due to him from his principal on account of advances made by him for the purchase of goods after giving credit to the principal for a particular item, the principal's right to claim damages from the agent with regard to this item by suit is not barred, as it is not obligatory upon a defendant to plead an equitable set-off¹². The whole basis of a decree for accounts is the liability on the part of the defendant to an account. A finding that it would be convenient to have the accounts examined in court will not suffice to bring a suit for accounts against a party, especially when the principal has got all the accounts of his agent in his possession¹³. The law does not impose any duty upon a plaintiff who calls his agent to account to satisfy the court that there is or ought reasonably to have been some surplus in the hands of the agent. The plaintiff has only to show that the defendant is an accounting party¹⁴, and disclose such particulars as would establish a *prima facie* liability against the agent¹⁵. A suit for accounts against an agent necessarily involves an undertaking by the principal to pay to the agent any sum that may be found due to the agent on the taking of accounts and it is unnecessary that the agent should plead a set-off or counter-claim¹⁶. In a suit for an account, it is open to the agent to say that on accounts being gone into, money would be found to be due to him and that

6 *Prasanna v. Burn & Co.*, 7 IC 270, 274; see *Ram v. Partab*, 1948 A 138 as to when account can be reopened.

7 *Kalanund v. Gir Prosad*, 17 CWN 1060, the rule does not apply to the case of principal and surety.

8 *Ram v. Imperial Oil Co.*, 42 IC 375.

9 *Blaustein v. M. M. & Co.*, (1937) 2 KB 142.

10 *Jagannath v. Pandhari*, 1937 N 172.

11 *Abhai v. Keshodas*, 13 IC 642.

12 *Govinda v. Rudrayya*, 49 MLJ 14.

13 *Nalini v. Gadadhar*, 49 CLJ 245; *Bharat v. Kiran*, 52 C 766; *Shiva v. Hanuman*, 1938 P 392.

14 *Ram Das v. Bhagwat*, 1 ALJ 347, cited in *Shankar v. Toshani*, 32 ALJ 453.

15 *Badri v. Kesho*, 1940 P 114; *Shiva v. Hanuman*, 1938 P 392.

16 *Parmanand v. Jagat Narain*, 7 ALJ 543; *Bhawani v. Chajju*, 1937 A 236.

a decree should be passed in his favour for such amount as may be found due to him¹⁷. An agent cannot get a discharge by accounting to only one of two co-principals¹⁸. When an agent has to account to more than one principal, they must all sue. He is not liable to render separate accounts in separate suits to each of his principals to whom jointly he is accountable¹⁹. It is no doubt desirable that the court passing a preliminary decree for the taking of accounts should decide who is to be the accounting party. But it is open to the court to give instructions at any time to facilitate and regularise the taking of accounts²⁰. Interest on capital is not to be charged on the taking of account. Delay of the principal in collecting assets, on the agent leaving the business, should not prejudice the agent in the taking of accounts. Outstandings which have not been realised by the principal should not be insisted on to the prejudice of the agent¹.

On the death of the manager a fresh right to account accrues to the employer as against the manager's representative². But the representative may not be called upon to render an account in the same sense as the agent himself. The liability to render account is a personal one attaching to the agent and cannot be enforced against his heir. The remedy of the principal, in a case of this description, is to sue the representative for any loss he may have suffered by reason of the negligence or misconduct, the misfeasance or malfeasance, of his agent; in other words, the suit is not one for account strictly so called but a suit for money payable to the principal by the representatives of the agent out of the assets in their hands³. A principal is entitled to have the accounts kept by the deceased agent explained by the heirs of the latter. He must put in a statement of claim against the heirs and prove each item⁴. In a suit by the principal against the agent's legal representative for rendition of accounts and for the recovery of the amount due, the burden of proof of the amount due is on the plaintiff⁵. Even as against the representatives of an agent the principal is entitled to a decree for sums actually due to him on account of the agent having received and failed to account for them and also for sums which he negligently failed to collect when it was his duty to collect without proving actual receipt of the sums by the agent. The only difference in substance between a suit for account against

17 *Harinath v. Krishna*, 14 C 147; *Ramalinga v. Raghunath*, 20 M 418, *refd.* in to *Wali v. Khoja I. Trading Co.*, 150 IC 464.

18 *Jagdip v. Rajo*, 75 IC 1022; *Raghbar v. Firm Piare Lal*, 1933 L 93.

19 *Kadir v. Raicherressa*, 62 IC 766.

20 *Ram v. Ramchand*, 157 IC 1113.

1 *Subramania v. Kannappa*, 1938 M 38.

2 *Lawless v. Calcutta L. & S. Co.*, 7 C 627; *Sasi Sekhaheswar v. Hajirannessa*, 28 CLJ 492.

3 *Kumeda v. Ashutosh*, 17 CWN 5; *Rameshwar v. Narendra*, 71 IC 916; *Badri v. Kesho*, 1940 P 114; *People's Bank v. Hargopal*, 1936 L 268; *Ashu v. Arun*, 1950 Dacca 13 : 54 CWN (2 DR) 188.

4 *Biraj v. Abani*, 42 CWN 1157.

5 *Sita Dulari v. Bhagwati*, AIR 1973 All 260.

an agent and that against the agent's representative is that the burden of proof in the latter case will be upon the plaintiff⁶.

3. **Limitation.**—Under the section an agent is bound to render proper accounts to his principal on demand. It is his duty to keep proper accounts of his dealings and a demand by a principal accompanied by non-compliance on the part of the agent would amount to a refusal under Art. 89 of the Limitation Act⁷. A suit by a principal against his agent for an account and also for recovery of money that may be found due from him is a suit for movable property received by the agent on behalf of the principal and not accounted for and is governed by Art. 89⁸, and not Art. 120⁹ or Art. 62¹⁰. Art. 90 applies to suits by principals against agents for misconduct, neglect, etc.¹¹. Art. 89 also applies to a suit brought by the legal representatives of the principal against the agent or *vice versa*¹². The above Articles have since been renumbered.

214. Agent's duty to communicate with principal.—It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.—If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to

6 *Venkata v. Mohana*, 44 M 214; *Purshottam v. Ram*, 1945 B 21.

7 *Ganesh Das v. Gangaram*, 123 IC 228.

8 *Madhusudan v. Rakhal*, 43 C 248; *Sibchandra v. Chandra*, 1 CLJ 232; *Madhub v. Debendra*, 1 CLJ 147; *Mahendra v. Jadu*, 9 CLJ 107; see *Bhagatram v. Harjas*, 112 IC 719; *Puran Mal v. Ford Macdonald*, 41 A 635; *Bikram v. Jadab*, 1935 C 817.

9 *Jogendra v. Debnath*, 8 CWN 113.

10 *Khondkar v. Muhammad*, 60 C 1347.

11 *Rameshwar v. Narendra*, 71 IC 916; *People's Bank v. Hargopal*, 1936 L 268.

12 *Bir v. Jadab*, 40 CWN 245; *Ashu v. Arun*, 1950 Dacca 13; 54 CWN (2 DR) 188.

buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

The section.—The law laid down in the section modifies and somewhat relaxes the English law on the subject¹³. The section gives the principal the right to repudiate the transaction when an agent, without the knowledge of the principal, deals with the business of the agency on his own account. S. 216 confers on the principal the right to claim the benefit gained by the agent so dealing if the principal chooses to adopt the transaction. The rule laid down in this section is subject to an important qualification; no such qualification, it will be seen, has been set out in S. 216. The rule may be shortly stated as that "a person, who stands in a relation of trust, or confidence, to another, shall not be permitted in pursuit of his private advantage to place himself in a situation which gives him a bias against the due discharge of that trust or confidence"¹⁴. It cannot be gainsaid that it is misconduct on an agent's part to deal on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his knowledge on the subject. Under English law the principal has the absolute right, when he ascertains that the agent has been clandestinely acting as principal in a contract connected with the business of the agency, to repudiate the contract. This right however, in India, is qualified by the section¹⁵. Where the principal cannot, by reason of the limitations imposed by the section, repudiate a contract on the ground merely that the agent has dealt on his own account in the business of the agency, there can be no question of the principal's electing to accept from the agent any satisfaction other than the performance of the obligation contemplated by the contract¹⁶.

2. Agent dealing on his own account.—A purchase or sale made by an agent of his own goods for or to his principal, without disclosing that fact, is not *ipso facto* void, nor is a contract for future delivery, if made by the agent with himself, void, because there is a possibility of its being disadvantageous to the principal¹⁷. An agent stands in a fiduciary relation towards his principal. He will not be permitted to enter into any transaction in which his personal interest conflicts with his duties towards his principal, except with the consent of the latter, given after all the material circumstances and the exact nature and extent of the interest of the agent have been fully disclosed to him. An agent for the sale of goods cannot make a secret profit for himself or for a person with whom he has been associated¹⁸. It is an equitable rule that no fiduciary agent shall, under pain of consequences, intentionally place himself in a position in which his interest may conflict with his duty.

¹³ *Rughunath v. Ram*, 160 IC 6.

¹⁴ *Burton v. Wookey*, 6 Madd 367, see Indian Trusts Act, Ss. 52, 53.

¹⁵ *Mamchand v. Chajuram*, 41 CWN 460.

¹⁶ *Ram v. Chajuram*, (1937) 1 Cal 757.

¹⁷ *Rameshardas v. Tansookhrai*, 102 IC 366.

¹⁸ *Mathra Das v. Jiwan Mal*, 9 Lah 7; *Rughunath v. Ram*, 160 IC 6.

The promoters of a company stand in a fiduciary relation to it and to those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves without fully and fairly disclosing to the company all material facts which the company ought to know¹⁹. In the leading case the rule is thus laid down : "The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the courts of equity have given protection and relief against the pressure of undue advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift"²⁰. It is the duty of an agent for arranging a loan and to get that loan on the best terms possible. He cannot put himself in a position in which his interests conflict with his duty and without full disclosure to his principal he cannot validly lend his own money to his principal upon terms which he has adjusted. The effect of the breach of his fiduciary relationship, which is inherent in all agencies, is that the principal is entitled to regard the transaction as a voidable transaction, and to have it set aside in the usual way, if the parties can be remitted to their former position¹. If an agent deals on his own account in the business of the agency the principal may repudiate the transaction if it appears that the dealings of the agent have been disadvantageous to him². The mere possibility of the agent's duty to his own principal and his own interest being in conflict is sufficient to bring a case within the section. An agent instructed to sell goods cannot sell them to himself and then buy from himself on the due dates of delivery. A trade usage which is illegal and unreasonable is not binding on the principal³. It is the duty of an agent not merely to do nothing to injure the interests of the principal but to do all in his power to further them, and not to place himself in a position in which his interest might be adverse⁴. An agent is not entitled, being employed as a broker, to convert himself at will into a principal by allocating to him his (agent's) own goods⁵.

The law as stated in this section is different from the law of England, which is very strict indeed, the view being that the court will not allow a man in a fiduciary capacity to put himself in a position in which his interest might be adverse to the interest of his principal. Under the law, as stated in the section, in order to set aside a transaction it is necessary either that the agent should have concealed a material fact dishonestly or that the dealing should have been in fact to the disadvantage of the principal. The concluding words are put there expressly to make applicable to the case of

19 *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch 442, 422.

20 *Erlanger v. New Sombrero P. Co.*, 3 AC 1218, 1230 : (1874-80) All ER Rep 271.

1 *Bisweswar v. Guru Charan*, 48 CLJ 266 ; *Regier v. Campbell-Stuart*, 1939 Ch 766 : (1939) 3 All ER 235.

2 *Kota v. Nalam*, 42 IC 357.

3 *Jankidas v. Dhumanmal*, 37 IC 241.

4 *Puran Mal v. Ford*, 41 A 635.

5 *Ratanlal v. Brijmohan*, 33 Bom LR 703.

principal and agent the general rules as to fraud which appear in Ss. 17 and 19. This section cannot be used to render lawful actual dishonesty on the part of an agent⁶. Under S. 88 of the Indian Trusts Act it is the duty of an agent not merely to do nothing to injure the interests of the plaintiff, but to do all in his power to further them and therefore not to place himself in a position in which his interest might be adverse. The agent might be compelled by suit to account for the profits which he has made in his own private business⁷. If there has been any underhand dealing by the agent it is not enough for him to tell the principal that he is going to have an interest in the purchase. He must make a full disclosure of the exact nature of his interest. It is not sufficient to make statements such as may put the principal on enquiry⁸. Even an agent can become a purchaser if he pays the price to the principal on his own responsibility⁹.

3. **English Law.**—"An agent employed to purchase cannot legally buy his own goods for his principal. Neither can an agent, employed to sell, himself purchase the goods of his principal"¹⁰. As soon as the owner discovers the true position he may declare himself not bound, or he may adopt the purchase, i.e., ratify the transaction¹¹. "Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer, or that the price paid was the full value of the property so purchased; and this must be shown with the utmost clearness and beyond all reasonable doubt"¹². "Any surreptitious dealing between one principal and the agent of the other principal (e.g., by the payment of a secret commission) is a fraud on such other principal," and the defrauded principal can apply to court to have the contract rescinded or, if he elects not to have it rescinded, to recover from the agent the sum received by him, it is unnecessary to go further and see what effect the offer had on the mind of the person to whom it was made.^{12a} As has been said, "no man should be allowed to have an interest against his duty"¹³. The principal may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of entering into the contract¹⁴, or, as has been stated above, he may have the transaction

6 *Achutha v. Bowden*, 45 M 1005.

7 *Puran Mal v. Ford*, 41 A 635.

8 *Dunne v. English*, LR 18 Eq. 524, 533 sq.; *Battison v. Hobson*, (1896) 2 Ch 403, 413, 414.

9 *Gordon Woodroffe & Co., v. Shaik M. A. Majid*, AIR 1967 SC 181, 185-86.

10 *Bentley v. Craven*, 52 ER 29; *Rothschild v. Brookman*, 5 Bli. NS 165, 192; see *Farrar v. Farrars Ltd.*, 40 Ch D 359, 409; *Murphy v. O. Shea*, 2 J & La 422.

11 *Aktieselskabet v. Harding & Sons*, (1928) 2 KB 371, 383; *Waddell v. Blockey*, 4 QBD 678.

12 *Charter v. Trevelyan*, 11 Cl & F 716, 732.

12a *Panama & S. P. Telegraph Co. v. Indian Rubber Works*, LR 10 Ch 515; *Salford Corp. v. Lever*, (1891) 1 QB 168, fold in *Hovenden v. Millhoff*, 83 LT 41; (1900-03) All ER Rep 848.

13 *Shipway v. Broadwood*, (1899) 1 QB 369.

14 *Grant v. Gold Exploration Syndicate*, (1900) 1 QB 233, 244.

set aside as fraudulent and recover any sum that he may have paid¹⁵. Where a lender pays a commission to the borrower's agent, without the consent of the borrower, the contract is voidable against the debtor¹⁶. Custom not known to the principal allowing an agent to sell his own goods to the principal cannot override the general law of agency¹⁷.

216. Principal's right to benefit gained by agent dealing on his own account in business of agency.—If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

1. The section.—No man acting as an agent can be allowed to put himself in a position in which his interest and his duty will be in conflict; and no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal¹⁸. "If a person, while holding a fiduciary position and acting in that capacity, makes a profit without fully disclosing his interest to those persons towards whom he stands in such a position, he must account to them for that profit¹⁹. In other words, an agent who sells goods at a profit to his principal is obliged to account to the principal the difference between the price at which he buys and that at which he sells²⁰; or, as has been said, the difference between the price at which the agent supplies to the principal and the true value of the goods at that date. The section, in effect, imposes something in the nature of a penalty upon an agent who acts improperly by converting himself into a principal, without making due disclosure. The operation of the section does not depend in any way upon the principal having suffered any loss. Of course, if goods are acquired by an agent as an agent on behalf of a principal at a particular price, and the agent later on supplies these goods to the principal at an enhanced price, there is fraud on the part of the agent, which can be dealt with apart from the section¹. It is no answer to

15 *Phosphate Sewage Co. v. Hartmont*, 5 Ch D 394; *Alexander v. Webber*, (1922) 1 KB 642.

16 *Re A Debtor*, (1927) 2 Ch 367.

17 *Mollett v. Robinson*, LR 5 CP 646 on app. LR 7 HL 802; see next section.

18 *Parker v. Mc. Kenna*, LR 10 Ch 96, 118, 124: (1874-80) All ER Rep 443; *Albion Steel Co. v. Martin*, 1 Ch D 580, 585; *Bray v. Ford*, 1896 AC 44, 51: (1895-99) All ER Rep 1009; *Goverdhan v. Abdul*, 1942 M 634.

19 *C. R. Ry. Co. v. Forwood*, (1901) 1 Ch 746, 766; *Fowcet v. Whitehouse*, R & M 132; *Regier v. Campbell Stuart*, 1939 Ch 766: (1939) 3 All ER 235.

20 *Kimber v. Barber*, LR 8 Ch 56.

1. *Kaluram v. Chimniram*, 36 Bom LR 68.

say that in the course of acquiring the benefit which has been derived by the trustee or agent, he incurred a possibility of loss. That may well be; but if the transaction has resulted in gain, and is one which the trustee or agent has in reality been enabled to accomplish what he has done by virtue of his trusteeship or his agency, the consequence results that the whole benefit of the transaction belongs to the person whom he must be considered to have represented throughout². Money for the principal lying in the hands of the agent is the trust money and is liable to be followed as such if it can be traced³.

An agent is not entitled to make a secret charge against his principal any more than he is entitled to make a secret profit which he does not disclose in his account. The two things stand on precisely the same footing⁴. If an agent, employed to effect a purchase on behalf of his principal from a third person upon certain terms, either sells his own goods to his principal or as agent buys from a third person upon other terms, the principal thereby is not bound, and in either event he is at liberty to repudiate the act of his agent in effecting the contract. If the agent sells his own goods and the principal adopts the transaction, the relationship of the parties *quoad* the contract of sale ceases to be that of principal and agent and ripens into that of vendor and purchaser⁵. When an agent utilises the principal's money and makes a profit he cannot turn round and treat it as if it was an independent transaction. It is open to the principal to call upon the agent to make good to him the profit he has so earned⁶. When an article is entrusted to an agent to be used for the owner's benefit, all the profits which the agent may make by using that article belong to the owner. Thus, the master of a vessel is liable to account to the owners for all profits made by a cargo of his own which the master placed on the vessel without the owner's knowledge⁷. A commission agent is not at liberty to supply goods at a particular rate or otherwise than at the rate prevailing in the market at the time of supply, though the name of the firm from which he purchased need not be disclosed⁸. Where an agent, whether of the vendor⁹ or of the purchaser, receives a secret profit from the other party not only must he account for that profit to the principal but he is not entitled to any commission from his principal¹⁰.

"It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer nor can a broker employed to buy become himself the seller, without distinct notice to the principal so that the

2 *Williams v. Stevens*, LR 1 PC 352, 359.

3 *Ex. p. Cooke*, 4 Ch D 123.

4 *Stubbs v. Slater*, (1910) 1 Ch 195, 203, on app. 632.

5 *Holmes Wilson & Co. v. Batakrishna*, 54 C 549; see *Karuna v. Lankaran*, 149 IC 61.

6 *Kadiresan v. Ramanathan*, 102 IC 561; see *Gadde v. Anumolu*, 1937 M 810.

7 *Shalcross v. Oldham*, 2 J & H 609.

8 *Babulal v. Netram*, 64 IC 6.

9 *Andrews v. Ramsay & Co.*, (1903) 2 KB 635.

10 *Abdul v. Rangiah*, 22 IC 597.

latter may object if he thinks proper"¹¹. "It is founded on this principle that an agent will not be allowed to place himself in a situation which under ordinary circumstances would tempt a man to do that which is not the best for his principal and it is the plain duty of every agent to do the best he can for his principal." In *Dally v. Wonham*¹², the sale to an agent for an inadequate price was set aside. In the case of *Barker v. Harrison*¹³ an agent who had purchased lands of his principal and who, previously to the contract, had entered into a secret negotiation for resale of a part of the property at a profit, was declared to be a trustee for his principal to the extent of that profit. In a number of English cases the acts of mortgagees in possession or of agents have held to have been performed on behalf of their principal and to be acts for the benefit of which they were bound to account to their mortgagors or principals. These principles of English law are incorporated in Ss. 215 and 216. But before S. 216 can be applied it must be shown that (i) the agent was dealing as agent and "in the business of the agency"; and (ii) the agent must make a special use of the knowledge obtained in respect of the subject matter of the business or derive peculiar facilities for entering into the business himself in his capacity as agent¹⁴. There is no difference between a profit made by an agent after he has become an agent, and profit through a bargain made by him at the time when he becomes an agent—a bargain made, not with his principal, but with a person who is proposing to enter into a contract with the principal. While negotiations are proceeding and before any contract is concluded between the vendor and the purchaser, if the vendor were to say to some particular person, "If you will become the agent of the purchaser, and you succeed in carrying out the contract with me, then I will make you a payment out of the purchase money," it is impossible that such a transaction could stand¹⁵.

The commission earned by an agent as the result of a corrupt bargain forms a debt due from him to the principal and cannot be treated as being the money of the principal, so that their relation is not that of trustee and *cestui que trust*¹⁶. An agent is not entitled to make a secret charge against his principal any more than he is entitled to make a secret profit which he does not disclose in his accounts¹⁷. The principal is entitled to recover from the agent any sum that may have been received by the agent by way of a bribe and the statute of limitations begins to run from the time when the fraud is first known to the principal, the liability being a debt only¹⁸. When an agent receives moneys on behalf of trustees he can only be discharged

11. *Mollett v. Robinson*, LR 5 CP 646, 655; *Bentley v. Craven*, 52 ER 29.

12. 55 ER 326.

13. 63 ER 854.

14. *Official Assignee, Rangoon v. R. M. Firm*, 7 Rang 61.

15. *Re Canadian Oil Works*, LR 10 Ch 593, 602-3.

16. *Lister & Co. v. Stubbs*, 54 Ch D 1: (1886-90) All ER Rep 797; fold in *Powell v. Jones*, (1905) 1 KB 11.

17. *Stubbs v. Slater*, (1910) 1 Ch D 195.

18. *Metropolitan Bank v. Heiron*, 5 Ex D 319.

of such moneys by joint payment to, or joint receipts of, all trustees¹⁹.

S. 216 is an enabling section and confers upon a principal the right to claim from his agent the benefit of the transaction to which the agency business relates, where the agent without the knowledge of his principal has dealt with the business on his own account instead of on account of the latter. The principal is free to exercise that right or not. Where a party elects to adopt a transaction he must take its benefit with its burden. He cannot be, as is said, "both approbate and reprobate." Both the benefit and the burden must, for the purpose, be attached to and form incidents of the transaction which the principal has affirmed by election. An agent who, without the principal's consent and knowledge, has dealt with the business of the agency on his own account, i.e., has wrongfully converted himself into a principal, is not entitled to recover any commission in respect of the transaction²⁰.

2. **Principal entitled to benefit.**—"It may be laid down as a general principle that in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers." So where an agent purchases goods according to order and sells them again to advantage¹, or sells his own goods at a price in excess of the market price², his employer is entitled to the profits. Thus, where a discount granted by a tradesman was retained by the agent, the court observed: "What appears in this case shows the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting"³. When an employee makes an invention in the course of his employment with the help of the employer's materials, such invention becomes the property of the employer, the employee becomes a trustee after he has left the employment⁴.

An agent to buy or sell cannot as principal sell to or buy from his own principal. "The power to add on to the price of article bought an arbitrary sum is a taking of profit and not a commission, and is compatible only with a sale and resale. It is absolutely inconsistent with the duty of an agent for purchase, inasmuch as it is the essential idea of a purchase through a broker or any other agent of the kind that the whole benefit of the purchase should go to the principal, and the sole interest of the agent should be in the commission allowed him by his principal. The office of a

19 *Lee v. Sankey* 14 Eq. 204, 210; *Re Flower*, 27 Ch D 592

20 *Joachinson v. Meghjee*, 34 B 292; *Mamchand v. Chajuram*, 41 CWN 460; *Salomons v. Pender*, 3 H & C 639.

1 *Morison v. Thompson*, LR 9 QB 480, 485, Story cited.

2 *Bentinck v. Fenn*, 12 AC 652, 659, what if the agent was asked to buy the specific property owned by him?

3 *Turnbull v. Garden*, 38 LJ Ch 331, 334.

4 *Triple Safety Glass v. Scorch*, 1938 Ch 211.

broker is to make a privity of contract between two principals, and this is utterly incompatible with making a contract at one price with the one and a corresponding contract at another price with the other and pocketing the difference"⁵.

A contract to give a bribe to an agent, even though it does not take effect and the employers are not actually injured, is a corrupt one and cannot be enforced⁶. Where the agent is influenced in his conduct to the prejudice of his principal, the contract is voidable at the option of the principal⁷. If an agent takes a bribe from a third person, whether he calls it a commission or by any other name, for the performance of a duty which he is bound to perform for his principal, he must give up to the principal whatever he has by reason of the fraud received beyond his due. The principal may also recover from the agent and the third person jointly or severally the extra price the latter has received without any deduction by reason of the principal having recovered from the agent the bribe which he had received. The principal may at his option sue the agent or the third person first. If by bribing the seller's agent, property is purchased at less than its full value with a view to resale at a higher price unknown to the vendor, the agent and the purchaser are both liable to the vendor for the profit made on resale⁸. The principal is entitled to recover interest on bribes paid to the agent from the date of their receipts¹⁰. An agent is bound to make over to the principal the return commission received by him, i.e., profits earned by consigning the principal's goods to various firms¹¹. Where by a custom, which is not unreasonable, an agent not remunerated by the principal receives a commission or allowance, such as is usual in the trade, from a third party he is not bound to account for it to the principal¹². Also an agent may retain a commission which is customary in the business and known to the principal, so that it may be regarded as a part of the terms of the agent's employment¹³. A director cannot retain a gift made to him by a promoter of a company, but must either hand it over to the company or pay its highest value¹⁴.

The doctrine laid down in *Andrews v. Ramsay & Co.*¹⁵ does not apply to the case of an agency where the transactions in question are separable, and does not entitle the principal to pay any commission to the agent in cases where he has acted honestly because in other cases he has acted dishonestly.

5 *Johnson v. Kearley*, (1908) 2 KB 514, 528.

6 *Harrington v. Victoria, G. Dock* 3 QBD 549.

7 *Smith v. Sorby*, 3 QBD 552 n.

8 *Mayor of Salford v. Lever*, (1891) 1 QB 168.

9 *Morgan v. Elford*, 4 Ch D 352; see Ex. p. *Larking*, 4 Ch D 566.

10 *N. & B. Iron Works v. Grave*, 12 Ch D 738.

11 *Mayen v. Alston*, 16 M 238, 265, custom not proved.

12 *Great Western Insurance Co. v. Cunliffe*, LR 9 Ch 525.

13 *Williamson v. Hine*, (1891) 1 Ch 390.

14 *Eden v. R. R. L. & L. Co.*, 23 QBD 368; see *Jubilee Cotton Mills v. Lewis*, 1924 AC 958.

15 (1903) 2 KB 635.

An agent bound to sell only his principal's goods, if he supplies the goods of others, is bound to account for the profits made by him on such sales¹⁶.

3. **Solicitor and client.**—Solicitors cannot make secret profits out of transactions entered into on behalf of their clients¹⁷, nor recover any remuneration for their professional services beyond that to which they are legally entitled¹⁸. A solicitor who lends money on mortgage to his client on any but the usual terms, unless they are properly explained to the client, would be liable for any loss occasioned to the client¹⁹. The relation of solicitor and client is that of principal and agent; where therefore, a solicitor having an interest in some property sells it to a client, and thereby makes a profit, he is a trustee for his client in respect of his share in the property sold and must return the amount of the profit made by him with interest²⁰. A solicitor may purchase from his client, but there is imposed on him the burden of proving that his client was fully informed and duly and honestly advised, and that the price was just¹. It is not necessary that the solicitor should establish that he and his client were "substantially at arm's length and on equal footing"². Where a client purchased a patent and a solicitor received a commission for negotiating the sale, *held* that the client could not recover the profits received, with full knowledge on his part, by the solicitor. If the solicitor had not made a full disclosure the client would have been entitled to recover the amount from him³. A sale by a client to a solicitor would be upheld if the client was fully informed of all material facts, had competent and independent advice, and not only the price but also the transaction was a fair one. Even after the termination of the relationship the same principle applies so long as the confidence, naturally arising from such a relationship, is proved or may be presumed to continue⁴. Even if an attorney be entitled to purchase, if instead of purchasing openly, he does so in the name of his son without disclosing the fact, such a purchase cannot stand⁵. The contract of a solicitor when he accepts a retainer in a common law action is an entire contract to carry on the action till it is finished and he cannot sue for costs before the action is at an end, unless the client refuses to supply him with the necessary funds for disbursement or the client insists on the solicitor taking some step which is dishonourable. He has no claim for costs if he discharges himself⁶.

16 *Nitedals v. Bruster*, (1906) 2 Ch 671.

17 *Re Haslam*, (1902) 1 Ch 765.

18 *O' Brien v. Lewis*, 32 LJ Ch 569 : (1861-73) All ER Rep 765.

19 *Pooley's Trustee v. Whetham*, 33 Ch D 111.

20 *Tyrell v. Bank of London*, 10 HLC 26.

1 *Holman v. Loynes*, 4 DM & G 270, 284; see *Luddy's Trustee v. Peard*, 33 Ch D 500 : (1886-90) All ER Rep 968.

2 *Edwards v. Meyrick*, 2 Hare 60, 69, 70; *Lyddon v. Moss*, 4 DG & J 104.

3 *Re Haslam*, (1902) 1 Ch 765.

4 *Wright v. Carter*, (1903) 1 Ch 27 : (1900-03) All ER Rep 706; *Demerara Bauxite Co. v. Hubbard*, 1923 AC 673, 681, 675; *Allison v. Clayhills*, 97 LT 709 : (1904-07) All ER Rep 500. Query, whether the presumption of undue influence is rebutted by a separate solicitor being called in to advise the client.

5 *Raja Mohan v. Nisar*, 164 IC 945.

6 *Underwood v. Lewis*, (1894) 2 QB 306 : (1891-94) All ER Rep 1203.

4. Without the principal's knowledge.—An agent may take a lease from his principal, but he must always be prepared to prove that full information has been imparted to his principal and that the contract has been entered into with perfect good faith⁷. Where agents for a principal entered into a contract for sale of grain for future delivery, and by means of goods of their own discharged those contracts, and when the principal sent their goods the agent resold them at a substantial profit, *held* the agent was bound to account for the profit made by the resale of the principal's goods. Where the agent sold his own goods to the principal at a price slightly in excess of the market rate and charged commission and brokerage, *held* the principal was entitled to repudiate the transaction and he could not be alleged to have ratified it in the absence of knowledge that the agents were selling their own property and charging in excess of the market rate⁸. On the same principle a promoter of a company is not entitled to make a secret profit out of the formation of the company without the knowledge of the directors. The company is entitled to recover such profit or so much of it as remains unpaid to the promoter⁹. Promoters or directors of a company cannot sell lands to the company at an increased price¹⁰. The directors occupy a fiduciary position to the company and must account to the company for shares given by promoters in order to induce them to act as directors¹¹. Where an agent, before accepting the agency, had an interest in the property, and during the agency sold that property to his principal without disclosing his interest, the principal had a right to rescind the contract. Where, however, the principal adopts the contract he has no further right against the agent; he cannot then claim the difference between the price at which the goods were bought and that at which they were sold. This is not a case of profit made clandestinely or surreptitiously, because those profits have not arisen from the original transaction alone but from the adoption of it by the principal¹².

217. Agent's right of retainer out of sums received on principal's account.—An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

The section.—The section gives the agent the right to retain moneys due to himself for advances made or expenses incurred on the principal's account. A similar right of retainer is again conferred by S. 219. S. 221 gives the

7 *Molony v. Kernan*, 2 Dr & W 31.

8 *Damodar v. Sheoram*, 29 A 730.

9 *Whaley Bridge Calico Printing Co. v. Green*, 5 QBD 109.

10 *Ex. p. Larking*, 4 Ch D 566.

11 *N. B. Iron Works v. Grave*, 12 Ch D 738; *L. & W. Iron Co. v. Bird*, 33 Ch D 85, 94.

12 *Re Cape Breton Co.*, 29 Ch D 795, fold in *Ladywell Mining Co. v. Brooks*, 35 Ch D 400, approved in *Burland v. Earle*, 1902 AC 83.

agent a lien on the principal's property "until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him." A pleader has a right to recover the out of pocket expenses incurred by him from his client, and, under this section, to retain the amount out of sums received by him to the credit of his client. His lien is not waived or lost by taking a promissory note, which is not enforceable because it has not been reduced to writing and filed in court as required by the Legal Practitioners Act¹³. A *pucca adatia* is entitled to debit the principal with charges incurred in remitting the profits realised by him on the principal's behalf¹⁴.

218. Agent's duty to pay sums received for principal.—Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Agent's duty to pay to principal.—It is the first duty of an agent to be constantly ready with his accounts. But this must mean that the agent must be ready to render his accounts when they are demanded. If no demand is made upon him, it is a simple case of an agent retaining money which he ought to pay over, but which he has not been required to pay. In such a case the agent cannot be made to pay interest¹⁵. An agent who contrary to the principal's instructions keeps the principal's money in his own banking account is liable to pay simple interest, and compound interest when he employs the money in business¹⁶. A valid payment cannot be made to an agent by a mere arrangement between the debtor and the agent. The general rule of law is that authority to an agent to receive money implies that he is to receive it in cash. "The payer who knows that he is paying an agent must pay in such a manner as to facilitate and encourage the agent to pay it to his principal—at any rate, the payer cannot pay it to the agent by a settlement of account between himself and the agent"¹⁷. A buyer who deals with an agent and knows that he is an agent, though he does not know who the principal is, cannot set off a debt due to him from such agent in an action by the principal for the price of the goods¹⁸.

There is no exception to the rule laid down in the section. An agent, therefore, cannot plead that by reason of the money having been collected under an unlawful agreement made between the principal and a third person he is not liable to account for it to the principal. Sums not legally recoverable by the landlord, e.g., illegal cesses realised by an agent, must be accounted

13 *Subba Pillai v. Ramasami*, 27 M 512; as to solicitor's lien see S. 221 note.

14 *Kedarnal v. Surajmal*, 33 B 364.

15 *Turner v. Burkinshaw*, LR 2 Ch 488; *Tata v. Kunwar*, 1940 A 69; *Chaudhury v. Chaudhury*, 1945 P 196.

16 *Burdick v. Garrick*, LR 5 Ch 233.

17 *Pearson v. Scott*, 9 Ch D 198; *Sweeting v. Pearce*, 7 CBNS 449, 485, on app. 9 CBNS 534.

18 *Semenza v. Brinsley*, 34 LJCP 161; *Fish v. Kempton*, 18 LJCP 206; *Catterall v. Hindle*, LR 2 CP 368.

for to the landlord¹⁹. "If an agent receives money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received and cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party has waived by paying money"²⁰. A party cannot directly enforce an illegal contract; where, therefore, the contract of agency is itself illegal, the court will not assist either party in carrying it out¹. It has long been held that money paid under a mistake of fact can be recovered from the recipient, but an exception has been engrafted upon the rule that where money has been paid to a person known to be an agent for a principal and known as receiving as such, the agent cannot be sued if he has before notice of the mistake paid over the money to his principal². In *Vishinji v. Jasraj*³, it has been laid down that the case of an agent is different from that of a bond debtor or purchaser; the agent is not bound to find out his principal and pay him the amount due as damages for negligence on the agent's part.

Limitation.—An agent is not an express trustee, the claim against him can be barred by the statute of limitations unless he receives money from his principal on some special trust or to be applied for a particular purpose⁴.

219. When agent's remuneration becomes due.—In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

1. The section.—The section states when the agent's right to remuneration accrues. The principle on which the right is based has been thus laid down: "In order to entitle an agent to receive his remuneration he must have carried out that which he bargained to do or at any rate must have substantially done so and all conditions imposed by the contract must have been fulfilled."

Section 219 of the Indian Contract Act also provides that, in the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act⁵.

¹⁹ *Nagendrabala v. Guru Doyal*, 30 C 1011.

²⁰ *Bhola Nath v. Mul Chand*, 25 A 639; *Palaniyappa v. Chokalingam*, 44 M 334; *De Mattos v. Benjamin*, 63 LJQB 248; *Bridger v. Savage*, 15 QBD 363 (1881-85) All ER Rep 1065; *Tenant v. Elloitt*, 1 B & P 3: (1775-1802) All ER Rep 179.

¹ *Sykes v. Beadon*, 11 Ch D 170, 192: 48 LJ Ch 522: 40 LT 243.

² *Baylis v. Bishop of London*, (1913) 1 Ch. 127, 132: (1911-13) All ER Rep 273; see *Murray v. Mann*, 2 Ex. 538; *Holland v. Russell*, 3 LJQB 297.

³ 50 IC 146.

⁴ *North American Land Co. v. Watkins*, (1904) 1 Ch 242, affmd. (1904) 2 Ch 233.

⁵ *E. D. Sassoon & Co. v. C. I. T., Bombay City*, AIR 1954 SC 470, 476-7.

2. **Agent's right to remuneration when accrues.**—Whether an agent is entitled to any reward for work done depends on the terms of the employment. Where an agent was promised a remuneration if by a letter written by him he induced a person to become a purchaser or a mortgagee, although the person became a mortgagee but not on the inducement of the agent, the agent would not be entitled to any remuneration not even on a *quantum meruit* basis for work done by him, because his services were of no value at all to the principal⁶. A person promised a commission for procuring a loan of a sum of money is not entitled to the commission until he procures that sum. If a promise be conditional, e.g., when an architect is employed and it is stipulated that he should be paid in certain events, performance cannot be claimed unless the very event happens on the occurrence of which the performance (payment to the architect) becomes due^{6a}. Independently of any agreement or custom, the principal is not bound to pay any commission for collection of outstandings⁷. No broker, unless specially authorised, is entitled to get commission from both sides⁸.

Whether an agent has earned his commission or not depends on the intention of the parties to be deduced from the terms of the contract and the surrounding circumstances. Very clear words in a contract are necessary in order that the court may hold that the commission should be payable by an intending purchaser, whether he actually became the purchaser or not⁹. In *Green v. Lucas*¹⁰, it was held that the intention of the parties was that the commission was to be earned on the completion of the transaction, unless the matter fell through owing to the default of the principal. It is a settled rule for the construction of commission notes and the like documents, which refer to the remuneration of an agent, that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers, if not, fails. There appears to be no half-way house and it matters not that the plaintiff proves expenditure of time, money and skill. This rule is well illustrated by several cases¹¹. Thus, commission has been held not payable until an abstract of conveyance was drawn out¹²; commission has been held only payable on money being actually obtained¹³, or on completion of purchase¹⁴, or subject to title being approved by solicitor¹⁵, or if money be raised on specified terms¹⁶, or on the amount

6 *Green v. Mules*, 30 LJCP 343.

6a *Moffatt v. Laurie*, 24 LJCP 56.

7 *Karuthan v. Chidambaram*, (1938) 2 MLJ 79.

8 *Chowdhury v. Ezekiel*, 1933 R 184.

9 *Ayyanath v. Subramania*, 45 MLJ 409; as to the right of a broker to claim brokerage, see *Liladhar v. Mathuradas*, 58 B 583; but see *Farid v. Hargulal*, 1937 A 46.

10 33 LT 584, fold in *Fisher v. Drewett*, 39 LT 253: (1874-80) All ER Rep 604.

11 *Howard & Co. v. Manx Isles S. S. Co.*, (1923) 1 KB 110, 113, cited in *Satchidananda v. Nriya Nath*, 50 C 878.

12 *Alder v. Boyle*, 4 CB 635.

13 *Bull v. Price*, 7 Bing. 237.

14 *Battams v. Tompkins*, 8 TLR 707; *Sunderdas v. Tara*, 1944 S 168.

15 *Clack v. Wood*, 9 QBD 276.

16 *Mason v. Clifton*, 3 F & F 899.

of the capital to be brought into the business¹⁷, or on introduction of a prospective buyer¹⁸. The question of remuneration of an agent, therefore, turns entirely upon the construction of the terms on which the parties contracted, which is not always an easy matter to decide¹⁹.

Where an agent is entitled to a certain commission if he could procure dry merchantable palm oil, the oil supplied being wet, under the terms of contract, the agent is not entitled to any commission²⁰. "Where an agent was entitled to a commission on sale of property "subject to the title being approved by his solicitor, in order to be entitled to the commission the agent ought either to have proved that the title was approved or that there was such a title tendered as made it unreasonable not to approve it"²¹.

When the intention of the parties was that the commission should be paid only after defendant obtained his money, effect must be given to that intention. The plaintiff is not entitled to his commission until the defendant obtains his money or the plaintiff puts the defendant in a position in which there is no impediment in the way of his getting the money. If the defendant neglects or refuses to take the purchase money due to him that would have raised a different question. As no alternative claim for remuneration for work *quantum meruit* was made, no decree could be made on that basis². It is a well-established principle of law that where a person has been employed as an agent to bring about a transaction on behalf of his principal, he is entitled to have his remuneration only if the transaction in question is the direct consequence of his agency³. It need not necessarily be the immediate cause of the transaction, but it must be shown that it was brought about as the direct result of his intervention⁴. It is not sufficient for the agent to show that it would not have been entered into but for his services, if it resulted therefrom only as a casual or remote consequence⁵. To such cases the maxim *causa causans et non remoto spectatur* (the direct and not the remote cause of an event is to be regarded) is applicable. Where there is agreement to pay the agent a commission at certain rate no question of paying him in *quantum meruit* arises; he cannot be deprived of his commission merely because the transaction by him falls through subsequently or the principal derives no benefit from it⁶. A plaintiff alleging to have been employed on promise of a commission to negotiate a loan for the defendant is entitled under S. 70 to a reasonable compensation, though he fails to prove the alleged contract⁷. Thus, if it be proved that the plaintiff acted

17 *Martin v. Tucker*, 1 TLR 655.

18 *Velarshak v. S. Coal Co.*, 1943 PC 159.

19 *Biggs v. Gordon*, 8 CBNS 638, court divided in its opinion.

20 *Warde v. Stuart*, 1 CBNS 88; see *Fullwood v. Akerman*, 11 CBNS 737.

1 *Clock v. Wood*, 9 QBD 276.

2 *Immudipattam v. Annasamy*, 17 IC 106.

3 See *Bray v. Chandler*, 139 ER 1553, 18 CB 718; *Gibson v. Crick*, 31 LJ Ex 304.

4 *Burton v. Hughes*, 1 TLR 207.

5 *Tribe v. Taylor*, 1 CPD 505; *Jordon v. Ram*, 8 CWN 831.

6 *Andley Bros. v. Mc Cready*, 111 IC 99; *Houlder v. Mann Isles S. S. Co.*, (1923) 1 KB 110; (1922) All ER Rep 579 refd. to.

7 *Juala v. Bachcha*, 30 IC 223.

as a broker he is presumably entitled to his commission and even if he did not produce evidence to show the rate of commission a reasonable amount ought to be awarded to him as such commission⁸. "The current of modern decision is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their part of the bargain, irrespective of what may take place subsequently between the parties." But in each case the nature of the contract must be carefully considered⁹. When a principal in breach of his contract with the agent refuses to complete the transaction or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover by way of damages the loss actually sustained by him as a natural and probable consequence of such breach of contract¹⁰.

In the absence of any express stipulation an agent may be entitled to remuneration in accordance with the custom prevailing in the particular business. Custom supposes a special contract between the parties; in order to establish custom evidence of actual payment should be given. Usage is the legal evidence of custom¹¹. Wherever a contract is made in a particular trade all customs which regulate that trade are tacitly incorporated into the contract unless by express terms excluded¹².

3. **Substantially done.**—"Where the remuneration of an agent is payable upon the performance by him of a definite undertaking he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do even if the principal acquires no benefit from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction, in respect of which the remuneration is claimed, falls through, provided that it does not fall through in consequence of any act or default of the agent¹³. An agent introducing a purchaser does not earn his commission until the final contract of sale has been signed¹⁴, or at any rate, until he introduces a purchaser able, ready and willing to complete¹⁵; the seller by refusing to complete the sale cannot prevent the agent from earning his commission¹⁶. "A broker is entitled to his commission if the relation of buyer and seller is really brought about by him, although the actual sale has not been effected by him. A broker is entitled to his commission where he has induced in the vendor the contracting mind, the willingness to open negotiation upon a reasonable basis, even though a change or modification of the terms of the contract is made by the buyer and the seller without his intervention." If the introduction by the broker was

8 *Khurshed v. Asa Ram*, 146 IC 761.

9 *Stokes v. Soondermath*, 22 B 540; *Sushil v. Gauri*, 39 A 81.

10 *Raghumull v. Luchmondas*, 20 CWN 708.

11 *Read v. Rann*, 10 B & C 438.

12 *Parker v. Ibbetson*, 4 CBNS 346, 355; *Spartali v. Benecke*, 10 CB 212, 222.

13 *Satchidananda v. Nritya Nath*, 50 C 878, 887, old English cases are to the contrary, see *Kishan v. Purnendu*, 15 CLJ 40.

14 *Keppel v. Wheeler*, (1927) 1 KB 577; (1926) All ER Rep 207.

15 *Martin v. Perry*, (1931) 2 KB 310; (1931) All ER Rep 110.

16 *Trollope v. Martyn*, (1934) 2 KB 436.

the foundation on which the negotiation proceeded, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the broker's hands and deprive him of his commission¹⁷. It is the broker's duty to bring the parties together, to arrange a transaction and to get the contract completed. The performance of the contract is a matter between the promisor and the promisee, and the due fulfilment of the contract is not the *sine qua non* for the earning of the commission¹⁸. As has been observed, "if the contract afterwards, were to go off from the caprice of the lender or from the infirmity in the title, it would be immaterial to the plaintiff if that appears to be the understanding of the persons themselves"¹⁹. If the agent's connection with a transaction be too remote, e.g., where one broker speaks to another and he to a third, the first person is not entitled to commission²⁰. The agent must show that some act of his was the *causa causans*. Thus, where an agent introduced a creditor who made an advance and the agent got his commission, he was held not entitled to any commission on a second advance negotiated between the parties¹. In the absence of any special stipulation an agent is not entitled to compensation for his trouble and expense, nor is any commission payable unless the transaction has been directly effected and not obtained indirectly as a remote and casual consequence of his effort².

The law on the subject has been thus summed up³. An agent who finds a purchaser and establishes the relationship of vendor and purchaser between the parties, without actually bringing about the sale is entitled to his commission⁴. It is, however, necessary in order to entitle a broker to earn his commission to show that the transaction is completed, in the absence of any contract to the contrary, or, if the transaction be not completed, to show that the non-completion is due to the default of the principal⁵. But the principal cannot, by employing another broker in the midst of negotiations, however innocently, deprive the broker, who brought the parties together, of his commission⁶. If the negotiations carried on by the broker have completely ceased, and have been abandoned at the time his employment as a broker has ceased, the agency of the broker ceases too, and with it his right to claim remuneration. The test in such cases is⁷ whether the

17 *Municipal Corporation, Bombay v. Cuverji*, 20 B 124, expld. in *Stokes v. Soondernath*, 22 B 540, see cases reld. to; *Roopji v. Dyer*, 52 A 688; *Vasanji v. Karsondas*, 25 B 627; *Liladhar v. Mathuradas*, 58 B 583; *Elias v. Govind*, 30 C 202.

18 *Fazal v. Muhammad*, 156 IC 131.

19 *Green v. Lucas*, 33 LT 584; Authority of *Prickett v. Badger*, 1 CBNS 296, fold in *Martyrose v. Courjon*, 15 CLJ 312, shaken by *Green v. Lucas*, 33 LT 584 as pointed out in *Elias v. Govind*, 30 C 202.

20 *Gibson v. Crick*, 1 H & C 142, evidence of custom establishing such a right in the first agent not allowed to be given.

1 *Tribe v. Taylor*, 1 CPD 505.

2 *Jordon v. Ram*, 8 CWN 831.

3 *Liladhar v. Mathuradas*, 58 B 583.

4 See *Vasanji v. Karsondas*, 52 B 627; *Green v. Bartlett*, 14 CBNS 681.

5 See *Mehra v. Cassumbhai*, 24 Bom. LR 847.

6 See *Willkinson v. Martin*, 8 C & P 1.

7 See *Burchell v. G. & B. Collieries*, 1910 AC 614.

work of the broker who claims brokerage is the effective or efficient cause of the completion of the transaction. It is not sufficient to show that the transaction would not have been entered into but for the broker's services, if the transaction resulted therefrom only as a casual and remote consequence. It would be immaterial, however, if the transaction in suit was completed through another broker, unless the principal could show that the negotiations went off completely and were given up by the parties so far as the broker who claimed brokerage was concerned, and the transaction was completed as a result of separate negotiations through the exertions of another broker⁸. "Finding a purchaser" has been defined as introducing a purchaser to the vendor, or calling the premises to the notice of a purchaser⁹. The claim of *quantum meruit* can only arise upon a promise to be implied from a request by the principal to the broker to perform services for him or from the acceptance of such services as the broker (plaintiff) has rendered, so as to imply a promise to pay for the same. The claim does not arise where the parties have entered into an express agreement under which the broker was to get his brokerage if he brought about a transaction on certain terms. Commissions are not to be claimed by an agent on premiums paid by the insured to the company after the agency ceases, in the absence of a contract to the contrary¹⁰.

4. Agent prevented from earning remuneration.—Where the authority of an agent employed to sell on commission is revoked by the principal before that which he had been employed to do is, in fact, effected, the right of the agent to be remunerated for what he has done, in endeavouring to effect that for which he was employed, depends upon the terms on which he was employed¹¹. It is well established that in order to entitle a broker to his commission, he must prove either that the transaction has been completed, or that, if it is not, the non-completion was due to default on the part of the principal¹². Thus, where a plaintiff agrees to employ an agent for 5 years, he is bound to send samples to a reasonable extent to enable the agent to earn his commission and he is not absolved from this liability by the destruction of his manufactory by fire¹³. Where an agent is employed by a company to dispose of its shares and is promised a remuneration of £400 when all the shares should have been allotted, the agent is entitled to damages for £400 on the company being wound up before all the shares have been disposed of¹⁴. A broker employed to negotiate the sale of a house, if he finds a purchaser at the stipulated price is entitled to his brokerage, although the transaction is not completed, the owner failing to convey, and

⁸ See *Millar v. Radford*, 19 TLR 575.

⁹ See *Wilkinson v. Alston*, 48 LJQB 733.

¹⁰ *Provat v. P. Assce. Co.*, 1936 C 246.

¹¹ *Jordon v. Ram*, 8 CWN 831.

¹² *Mehra v. Cassumbhai*, 24 Bom LR 847; *Lott v. Outhwaite*, 10 TLR 76; *Trallope v. Caplan*, (1936) 2 KB 382.

¹³ *Turner v. Goldsmith*, (1891) 1 QB 544; (1891-94) All ER Rep 384.

¹⁴ *Inghald v. W. Neilgherry Coffee Co.*, 17 CBNS 733; (1861-73) All ER Rep 436.

is entitled to damages on the basis of his brokerage had the sale been completed¹⁵. Ordinarily a broker is entitled to a percentage on the money which he succeeds in realising for the principal, but where the transaction cannot be completed because the money is not forthcoming, consequently the principal realises nothing, the broker cannot have earned his brokerage¹⁶. An agent employed by a receiver to find a purchaser for some property is not entitled to any commission if the receiver has not obtained the leave of the court to employ an agent¹⁷. A person may be entitled to some remuneration for the trouble he has taken. Such remuneration should be claimed in the plaint. There can be no implied contract to remunerate an agent *quantum meruit* when there is no express contract¹⁸. If an agent employed for an agreed commission to sell property finds a purchaser with whom the terms are settled by the vendor but the latter at the last moment sells the property to another, inasmuch as the agent had done all that he was employed to perform, he is entitled to a reasonable remuneration¹⁹.

220. Agent not entitled to remuneration for business misconducted.—An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations

(a) A employs B to recover 1,00,000 rupees from C. and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B.

(b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services and must make good the loss.

1. Agent when not entitled to remuneration.—"A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission..... if an agent directly or indirectly colludes with the other side and so acts in opposition to the interest of his principal, he is not entitled to any commission." The agent, therefore, has not only to make over the secret profit made by him but he also loses his right to commission²⁰. Agents are not entitled to any remuneration in respect of contracts

15 *Gor v. Camillo*, 51 IC 582; *Raghu v. Madan*, 38 CLJ 139.

16 *Foucar & Co. v. Mudaliar*, 79 IC 750.

17 *Cousins v. The Company*, 1936 Ch. 271.

18 *Kishan v. Purnendu*, 15 CLJ 40, see cases reld. to, Halsbury, 4th ed., vol. 9 para 692.

19 *Martyrose v. Courjon*, 15 CLJ 312; *Annaswamy v. Zamindar of Ayakadi*, 6 IC 740.

20 *Andrews v. Ramsay & Co.*, (1903) 2 KB 635, 638, fold in *Joachinson v. Meghjee*, 34 B 292; see S. 215 note 2; *Re Manikyam*, 1940 M 298 (damages may be awarded against him).

in which they were the undisclosed principals although purporting to act as agents. When an agent acts as a principal in a contract without the knowledge of the party whose agent he is, he forfeits his right to remuneration from that party under the agency agreement, even where the party has chosen to abide by the agreement. No question of the party electing to accept a satisfaction, other than the performance of the contract according to its terms under S. 63, arises; in such a case the party was never in a position to accept the agent as principal¹.

2. **Exceptions.**—The rule that a dishonest agent cannot recover any commission at all does not apply where the agent is not guilty of fraud but retains money paid by another under a mistaken notion that he is entitled to it having regard to a general practice in the trade². Nor does the rule apply to the case of an agency where the transactions in question are separable and the agent has acted honestly in some of them but dishonestly in others. The principal cannot refuse to pay commission to his agent in cases where he has acted honestly, because there are other cases in which the agent acting under the same agreement has acted improperly and dishonestly³. An agent on discovering that he has been acting for both prospective buyer and seller asked the former to employ an independent agent, but this offer was not accepted; under the circumstances the agent was held entitled to commission from the purchaser⁴.

3. **Servant dismissed for misconduct.**—A servant wrongfully dismissed before the expiry of his term of service has three remedies open to him, namely, (i) he may bring a suit for damages for breach of contract thereby treating the contract as still in force; or (ii) he may wait till the termination of the period for which he was hired and then perhaps sue for the whole of his wages; or (iii) he may treat the contract as rescinded and immediately sue on a *quantum meruit* basis for the work done by him until the day of his dismissal. He cannot combine two of the remedies⁵. A servant rightfully dismissed for his misconduct is not entitled to recover wages *pro rata* for the broken period up to the date of his dismissal⁶. Where wages are payable monthly and a servant, after giving notice, whether according to law or custom, leaves his master's service, he is entitled to the wages of the last month of his service⁷.

221. Agent's lien on principal's property.—In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him until the account due to

1. *Mamchand v. Chajuram*, 41 CWN 460.

2. *Hippisley v. Knee Bros.*, (1905) 1 KB 1: 74 LJ KB 68.

3. *Nitedals v. Bruster*, (1906) 2 Ch 671.

4. *Harrods Ltd. v. Lemon*, (1931) 2 KB 157: (1931) All ER Rep 285.

5. *Goodman v. Pocock*, 19 LJQB 410.

6. *Turner v. Robinson*, 5 B & Ad 789; *Ridgway v. Hungerford Market*, 4 LJB 157.

7. *George v. Davies*, (1911) 2 KB 454: (1911-13) All ER Rep 914.

himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

1. Lien.—A general lien is limited to the classes or persons mentioned in S. 171, see note 1. A particular lien can be claimed under this section on sums of money of the principal received by the agent in the course of the agency business⁸. An agent can claim no greater lien than the person who puts the document in his hands is capable of creating⁹. To an action for goods sold and delivered by an agent it is no answer merely to say that the price has been paid to the principal before action is brought. The agent's lien is not affected by payment to the principal direct¹⁰. An agent is entitled to retain the goods of the principal; until the payment of the amount due to him from the principal, he is not entitled to sell them in the absence of a mercantile custom authorising him to do so¹¹. An agent, pure and simple, may not be justified in selling his principal's goods without his authority. But if the agent had spent a large sum of money from his own pocket in purchasing the goods on the principal's behalf, he would be in the position of a tacit pledgee and could recover as much of his outlay as possible by selling the goods which were in his custody¹². An agent is not in a position analogous to that of a mortgagee in possession. The agent cannot therefore remain in possession of his principal's premises until the amount due to him is paid. "Both English and Indian law, therefore, confine the lien claimable in this case to commission, disbursements and services in respect of certain specific properties or things"¹³. In the absence of a contract to the contrary, the rights conferred upon an agent, who has a lien on the principal's property, are of a very limited character and seem to be confined to the mere right of retainer¹⁴.

Section 217 gives to an agent the right to retain, out of any sum received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business and such remuneration as may be payable to him for acting as agent. Section 221 also confers a right on the agent to retain the goods, papers and other property of the principal received by him until the amount due to him for commission, disbursements and services in respect of the same has been paid or accounted for by him. The right of retainer and lien conferred on the agent does not make the amount received by the agent on behalf of the principal any the less the property of the principal. The principal is the full owner and has complete control over his properties in the hands of the agent, subject only to the latter's statutory right of retainer

⁸ *Re Bombay Saw Mills*, 13 B 314.

⁹ *Capital Fire Insce. Assocn.*, 24 Ch D 408, 418.

¹⁰ *Robinson v. Rutter*, 24 LJQB 250.

¹¹ *Mulchand v. Sheo Mal*, 123 IC 867.

¹² *Bar v. Gopal*, 112 IC 642.

¹³ *Cannore Flour Mills v. K. I. Development*, 110 IC 23, *Re Bombay Saw Mills*, 13 B 314 cited.

and lien. It follows, therefore, that the entire sale proceeds received by the agent of an association are received on behalf of the association and belong to it subject to the rights of the agent¹⁵.

2. **Property over which lien attaches.**—The lien of an agent does not extend to property which has been made over to him by mistake or without the principal's authority¹⁶. Where the secretaries and treasurers of a company lent to the company a sum of one lakh of rupees prior to its liquidation, they could claim no lien in respect of the advance because this section confined the lien claimable to certain cases which did not cover advances¹⁷. But it has been pointed out in another case¹⁸ that an agent in possession of the property of a company has a lien on it for advances made by him and the lien is not affected by a winding up order. No person can give a lien upon deeds as against another person. He can only give a lien as against himself and to the extent of his own interest¹⁹. Property held by an agent for a special purpose cannot be subjected to a lien the existence of which is inconsistent with such a purpose. In order that an agent may have a valid lien on property in his hands, the following conditions *inter alia* must be satisfied : (i) there should be no arrangement inconsistent with the retention of such property in the exercise of the lien ; (ii) the property on which the right to lien is claimed should belong to the principal to the knowledge of the agent ; (iii) it should have been received by the agent in his capacity as agent during the course of his ordinary duties as agent ; (iv) the agent should be holding the property for and on behalf of his principal and not for and on account of any third party²⁰.

It is well settled that the possessory lien of an agent attaches only upon goods in respect of which the principal has, as against third persons, the right or power to create a lien ; such lien is confined to the rights of the principal in the goods at the time when it attaches, and is subject to all the rights and equities of third persons available against the principal at the time. The lien of the agent on property and goods is only given against third parties so far as the principal himself has rights and interests in the property¹.

3. **A sub-agent's lien.**—A sub-agent may, if properly constituted, claim a lien against the principal and this lien is not discharged by payment to the agent by the principal. A lien cannot be claimed so as to intercept the performance of the actual contract between the parties, whether that contract is express or is to be inferred from a certain course of dealings². A sub-agent

14 *Rakha Mal v. Prabh Dial*, 89 IC 409.

15 *Turner Morrison & Co. v. C. I. T.*, W. B., AIR 1953 SC 140, 143.

16 *Gibson v. May*, 4 DGM & G 512.

17 *Re Bombay Saw Mills*, 13 B 314.

18 *Chidambaram v. Tinnevely Sugar Mills*, 31 M 123.

19 *Turner v. Letts*, 20 Beav 185.

20 *Pestonji v. Ravji*, 150 IC 483.

1 *Hudson v. Morgan*, 9 CLJ 563, 570 ; *Peat v. Clayton*, (1906) 1 Ch 659.

2 *Fisher v. Smith*, 4 AC 1 ; *Montagu v. Forwood*, (1893) 2 QB 350 : 6 LT 371 : 9 TLR 634.

cannot claim such a lien where he knows that the person he is dealing with is acting for a principal, even if the principal's name be undisclosed³. A sub-agent employed without the knowledge and consent of the principal cannot have a lien over the principal's goods⁴.

4. **Solicitor's lien.**—A solicitor has a lien for his costs on property or funds recovered for his client by his exertion. The law in Indian courts is the same as existed in English courts before the passing of 23 & 24 Vict. c. 127. The parties cannot by collusion and conspiracy enter into a compromise and deprive the solicitor of his cost⁵. But there is no rule that the parties may not compromise an action without the intervention of their solicitors. They must, however, do so honestly and not intend to cheat the solicitors of their proper charges⁶. A solicitor's lien is not the result of contract; it is not an equitable charge; it is not an encumbrance affecting the estate. The general lien of a solicitor is merely a right to keep back from his client the deeds and papers which he holds as solicitor until his bill of costs is satisfied. It is a right derived entirely through the client, and, therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds, which come to the hands of the solicitor, is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands of the solicitor⁷. Where, with a view to borrowing money on mortgage, *A* delivers the title to *B* for examination and says he would pay all expenses, *B* hands over the title deeds to his own solicitor, when the negotiations go off, the solicitor is not entitled to a lien on the document⁸. The lien of an attorney remains though the claim is barred by limitation⁹.

5. **Extinguishment of lien.**—The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. An agent who delivers goods to a common carrier with instructions to treat the purchaser from his principal as consignor and consignee, and thus enables the purchaser to obtain prompt delivery of the goods even without producing the railway receipt, by executing an indemnity bond, cannot claim an agent's lien¹⁰. A right of lien is extinguished or lost by parting with possession of the goods¹¹. A lien may be lost in cases by agreeing to give up the thing, making a bargain at the same time for payment on a future date. The lien of an agent is lost by parting with possession, e.g., by making over possession to a

3 *Mildred v. Maspons*, 8 AC 874, 884, 889.

4 *Solly v. Rathbone*, 2 M & S 298.

5 *Devkabal v. Jefferson*, 10 B 248, 253, fold in *Cullianji v. Raghowji*, 30 B 27.

6 *The Hope*, 8 PD 144.

7 *Re Llewellyn*, (1891) 3 Ch 145; (1891-94) All ER Rep 1106; *Pelly v. Wathen*, 1 DGM & G 23; (1843-60) All ER Rep 386.

8 *Pratt v. Vizard*, 5 B & Ad 808; 3 LJB 7: 110 ER 989.

9 *Re Broomhead*, 16 LJB 355.

10 *Sekarchand v. Premji*, 120 IC 502; *Sweet v. Pym*, 1 East 4: (1775-1802) All ER Rep 92.

11 *Bligh v. Davies*, 28 Beav 211.

bailee for safe custody, unless the agent wants to retain his rights. But if the goods are lost the loss falls on the owner and not on the agent. If the agent had paid the price he cannot lose his lien as also his money—the agent in such cases loses his lien but the owner loses the money¹². A lien is destroyed if the party entitled to it gives up his right to the goods, e.g., by causing them to be taken in execution in his own suit¹³.

A solicitor by parting with the papers loses his lien upon them. But if the papers were improperly taken out of his office he will have a lien upon them¹⁴. Thus, where a solicitor removes from his office, unknown to the other partners, documents upon which the firm has a lien, the lien of the firm will not be thereby destroyed¹⁵. If a solicitor having a lien upon a document places it in the hands of an agent it cannot be said that his lien is defeated, nor can any change in the character of the document destroy the lien, if the agent has agreed to the altered document subject to the lien¹⁶. A solicitor's lien over his client's papers is lost when the solicitor acts for a third person to whom the client transfers his rights in the property to which the papers relate for by so doing the solicitor gives up his right to retain the documents¹⁷. A solicitor has a lien for his taxed costs, charges and expenses, but that lien clearly does not extend to any money advanced for other purposes. "Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case"¹⁸.

"It is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien and which is destructive of it"¹⁹. A company has a lien upon the shares of its members for debts owing by the members to itself. If, however, a member pledges his shares to some third party as a security for a loan, and the company has notice of the transaction, the company loses its lien for all debts owing by that member to the company subsequent to the knowledge of the company of the transaction²⁰. In order that a pledge may be effectual, possession must be continuous. But the pledgee may hand back to the pledgor as his agent for the purpose of sale without in the slightest degree diminishing the full force and effect of his security¹. A lien is not lost by the debt, in respect of which it is claimed, becoming barred².

12 *Fisher v. Smith*, 4 AC 1, 9; *Kishun v. Ganesh*, 1950 Pat. 481.

13 *Jacobs v. Latour*, 5 Bing. 130: (1824-34) All ER Rep 96.

14 *Dicas v. Stockley*, 7 C & P 587.

15 *Re Carter*, 55 LJ Ch 230.

16 *Watson v. Lyon*, 7 DGM & G 288.

17 *Re Lawrance*, (1894) 1 Ch 556; *Re Nicholson*, 53 LJ Ch 302: (1881-85) All ER Rep 294.

18 *Re Taylor*, (1891) 1 Ch 590, 597; *Re Douglas Norman & Co.*, (1898) 1 Ch 199.

19 *Angus v. Mc. Lachlan*, 23 Ch D 330, 335, 336: (1881-85) All ER Rep 845.

20 *Re Union I Sugar Mills*, 55 A 810.

1 *N. W. Bank v. Poynter*, 1895 AC 56: (1891-94) All ER Rep 754.

2 *Curwen v. Milburn*, 42 Ch D 424; *Re Broomhead*, 16 LJQB 355; *Re Carter*, 55 LJ Ch 230.

Principal's duty to Agent

222. Agent to be indemnified against consequences of lawful acts.—The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) *B*, at Singapore, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorizes him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

1. The section.—The section is confined to lawful acts done by the agent in the discharge of his duties. A principal is bound to indemnify the agent against loss sustained or injury incurred by the agent in the course of the agency business³, provided it was lawful. Where certain brokers pay the difference on shares bought on account of their principals and have to pay a further sum, on becoming defaulters, according to the rules of stock exchange, this latter amount is not recoverable from the principal⁴.

The promise of an indemnity is an implied term of the contract of agency and a refusal by the principal to indemnify justifies the agent in rescinding the agency⁵.

2. Agent's right to indemnity.—It is a well-known principle of the law of agency that every man who employs another to do an act, which the employer appears to have a right to authorise him to do, undertakes to indemnify him for all such as would be lawful if the employer had the authority he pretends to have. Auctioneers, brokers, factors, agents, do not take regular indemnities. Where a party authorises an auctioneer to sell certain goods, the property of a third person, who afterwards recovers against the auctioneer, the auctioneer can recover from his employer⁶. It is sufficient for an agent to prove that he has incurred liability to entitle him to be indemnified by his principal. If the claim of the creditor has been satisfied by the payment of a smaller sum, the principal is entitled to the benefit⁷. It

³ *Huntley v. Sanderson*, 2 LJ Ex 204; *Taylor v. Stray*, 2 CBNS 175, 196; 140 ER 380 Exch; *Williams v. Lister*, 109 LT 699; *Harak v. Sumati*, 1932 B 25; *Ram v. Lakshmi*, 1947 C 157.

⁴ *Duncan v. Hill*, LR 8 Ex 242, 248; *Hartas v. Ribbons*, 2 QBD 254.

⁵ *Rajaram v. Abdul*, 31 IC 450, see S. 39.

⁶ *Adamson v. Jarvis*, 4 Bing. 66, 72; (1824-34) All ER Rep 120.

⁷ *Total v. Khomal*, 1933 S 34.

is not necessary that the agent should discharge his liability in cash⁸. A principal is liable only for such losses and damages as are direct and immediate and naturally flow from the execution of the agency⁹. A ratification by the principal of the agent's act will make him liable to indemnify the agent though the agent has been in default¹⁰. *A*, a broker, contracted with *B* for the purchase (on behalf of *C*) of certain goods. *C* refusing to accept the goods, *B* sued *A* for the breach of contract. *C* had notice of the proceedings, but repudiated his liability and *A* defended the action unsuccessfully. In an action by *A* against *C* for the damages and costs paid and incurred by him in the first action, *C* paid into the court enough to cover the damages only, held, that *A* was entitled to recover the costs¹¹. Before an agent can successfully maintain any claim for indemnity against his principal, he must establish the fact that he has actually incurred a loss¹².

The employer is bound to indemnify the agent for losses if they arise by reason of the agent acting in accordance with the usage of the trade of the market in which he is engaged, provided the usage is reasonable¹³ and the principal is cognisant of the usage¹⁴. If a person employs a broker on the Stock Exchange, he employs him to sell according to the rules, and undertakes to indemnify the broker against any liability arising under the rules¹⁵. A person who directs another to deal in a particular market is to be treated as if he knows the rules of that market. Where, however, the principal is ignorant of the rules, and they are unreasonable or illegal, he is not liable to indemnify the agent¹⁶.

The right to indemnity depends upon the agent having carried out his mandate. If the mandate be to a broker to purchase from another broker on the Stock Exchange, that mandate does not justify a broker to act as principal in a transaction in which he is employed as a broker without the clearest notice to his employer¹⁷. A surety standing bail is entitled to recover the amount of the recognizance forfeited and the expenses of the bail¹⁸. Where some goods which the agents had bought for their principals and which were lying with them were destroyed by fire, the loss fell on the principals¹⁹. A person who deals with a commission agent is bound to indemnify him. The period of limitation is 3 years from the date when the plaintiff is actually damaged²⁰.

8 *Baksi v. Jasrop*, 1942 N 173.

9 *Duncan v. Hill*, LR 8 Ex 242, 244, 248; *Kodusa v. Surajmal*, 1936 N 37.

10 *Hartas v. Ribbons*, 22 QBD 254.

11 *Broom v. Hall*, 7 CBNS 503.

12 *Rugnath v. Ram*, 160 IC 6.

13 *Davis v. Howard*, 24 QBD 691; *Young v. Cole*, 3 Bing NC 724 : 132 ER 589.

14 *Seymour v. Bridge*, 14 QBD 460.

15 *Hawker v. Edwards*, 57 LJQB 147.

16 *Perry v. Barnett*, 15 QBD 388.

17 *Johnson v. Kearley*, (1902) 2 KB 514, distgd. in *Aston v. Kelsey*, (1913) 3 KB 314, when brokers transacted through other brokers.

18 *Jones v. Orchard*, 24 LJCP 229 : 139 ER 900; *Cripps v. Hartnoll*, 32 LJQB 381.

19 *Dhunput v. Hari*, 29 CWN 121.

20 *Bhagatram v. Harjas*, 112 IC 719.

A firm, A, carried on the business of commission agents both at Indore and Jodhpur. B from Jodhpur entered into several forward contracts for the purchase and sale of bullion through the firm at Indore. These transactions proved unprofitable to B and the loss aggregated to a sum of Rs. 21,423-1-6 pies. The entire amount was paid to third parties of Indore by A on behalf of B and A received in all a sum of Rs. 11,457-8-0 which B paid from time to time, towards these losses, to A's firm at Jodhpur. A, therefore, filed a suit in Jodhpur Court to recover the balance with interest. B pleaded, *inter alia*, that the transactions in suit amounted to wagering contracts which were illegal according to the Notification dated 3-6-1943 issued under the Defence of India Rules and hence the suit was not maintainable. It was held that the suit was really not one to enforce any contract relating to purchase or sale of bullion which came within the prohibition of the notification. It was a suit by an agent claiming indemnity against the principal for the loss which the agent had suffered in carrying out the directions of the principal. The right to such indemnity was founded on S. 222, Contract Act¹.

3. Lawful acts.—A wagering contract is void under S. 30 and not illegal. A principal is, therefore, bound to indemnify the agent for losses arising out of wagering transactions in which the agent has been engaged under the instructions of the principal². In an ordinary c. i. f. contract between vendors and purchasers, the tender of a bill of lading, after the contract of affreightment has been dissolved by the outbreak of war, is not such a tender as the purchasers are bound to accept; they are not, therefore, bound to pay for the goods³. Where, however, the goods are purchased from a commission agent, though he is regarded for some purposes as a principal, yet the real principal cannot refuse to accept the goods; if he does so he will be liable in an action by the agent for damages for breach of contract⁴. An agent can recover moneys paid out by him on behalf of his principal even on wagering contracts⁵. But where a statute declares expenses incurred by an ordinary agent to be illegal, he cannot recover them from his principal⁶.

4. Limitation.—A suit by a commission agent to recover loss on transactions entered into on behalf of constituents is governed by Art. 85. Art. 65 would not apply in the absence of a specified time or contingency⁷. Agents forfeit their right to indemnity in respect of fraudulent transactions intended to defraud their principal⁸. The above-mentioned Articles have since been renumbered.

1 *Kishan Lal v. Bhanwar Lal*, AIR 1954 SC 500, 502.

2 *Chekka v. Gajjala*, 14 MLJ 326; *Shibho Mal v. Lachman*, 23 A 165; *Parakh v. Ransoordass*, 12 BHCR 51.

3 *Karberg & Co. v. Blythe & Co.*, (1916) 1 KB 495 : 85 LJ KB 665 : 114 LT 152 : 32 TLR 186.

4 *Meredith v. Abdulla*, 41 M 1060.

5 *Behari Lal v. Parbhu Lal*, 79 PR 1908, cited in *Pirithi v. Matu*, 138 IC 241; *Pirithi v. Mamchand*, 156 IC 539.

6 *Re Parker*, 21 Ch D 408 : 52 LJ Ch 159 : 47 LT 633.

7 *Harakh v. Sumati*, 1932 B 25.

8 *Solloway v. Mc. Laughlin*, 1938 PC 23.

223. Agent to be indemnified against consequences of acts done in good faith.—Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

Illustrations

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

1. The section.—S. 223 declares that the agent's right of indemnity is not lost where the act done by him causes "an injury to the rights of third persons," i.e., is wrongful, provided the act is done in good faith⁹.

A principal is not liable to indemnify an agent for acts which are illegal¹⁰. But an agent is entitled to indemnity against unlawful acts, which are not criminal, provided he has acted in good faith and without knowledge that such acts are unlawful¹¹. Where a judgment creditor makes the sheriff his agent for the purpose of taking the goods of the judgment debtor, if the sheriff acting innocently in obedience to that command commits a trespass, he may recover from his principal the damages he has caused in consequence of the trespass¹².

It is well settled that every principal is civilly liable for every intentional wrong committed by an agent in the ordinary course of his employment and for the benefit of the principal, though the principal did not authorise it and had expressly forbidden it. Thus, the Municipal Board of Mussoorie was held liable for the wrongful act of its secretary in distraining the plaintiff's goods for a debt which did not in fact exist¹³. A master or principal is not liable for a malicious prosecution by his servant or agent, unless the prosecution was within the scope of the servant's or agent's authority, express or implied, without ratification¹⁴.

⁹ *Betts v. Gibbins*, 2 A & E 57.

¹⁰ *Re Parker*, 21 Ch D 408, expenses incurred by election sub-agents.

¹¹ *Madhowji v. Yar Hussain*, 88 IC 980.

¹² *Municipal Board, Mussoorie v. Goodall*, 1 ALJ 195, see illust. (a). Limitation for suit is 1 year under Sched. II art. 28.

¹⁴ *Raghunath v. Motiram*, 147 IC 1084; *Graham v. Glasgow Corp.*, 1947 AC 368; *Glasgow Corp. v. Bruce*, 1948 AC 79.

224. Non-liability of employer of agent to do a criminal act.—Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

1. The section.—“The general rule is that between wrongdoers there is neither indemnity nor contribution, the exception is where the act is not clearly illegal in itself.” “The rule applies only to cases where the person asking redress must be presumed to have known that he was doing an illegal act and does not extend to cases where he was a tortfeasor by inference of law only”¹⁵. Money spent in bribing public servants by certain partners of a firm with the consent of the other partners may be exhibited against the other partners¹⁶. For a purely criminal act, therefore, the agent has no right of indemnity against the principal¹⁷.

225. Compensation to agent for injury caused by principal's neglect.—The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.

Contributory negligence.—Under the section the agent is entitled to compensation for injury caused by the principal's neglect or want of skill, but he is not entitled to compensation if the injury sustained by him be due to the negligence of a fellow servant. That subject comes under the law of tort. A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service including the risk of negligence upon the part of a fellow servant, so cannot hold the master

¹⁵ *Betts v. Gibbons*, 2 A & E 57, 74, cited in *Hari v. Jatindra*, 5 CWN 393, 397.

¹⁶ *Joti Prasad v. Hardwari*, 53 A 54.

¹⁷ *Betts v. Gibbons*, 4 LJKB 1; *Firm Pratapchand v. Firm Kotrike*, AIR 1975 SC 1223, 1233.

liable for the injury. One man's misfortune must not be compensated for at another man's expense¹⁸. A servant has no cause of action against his master for the neglect of another servant in the common employment of the same master. Where, however, servants are engaged in different departments of duty, an injury committed by one servant upon the other is not within the exception¹⁹.

Effect of agency on contract with third persons

226. Enforcement and consequences of agent's contracts.—Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Illustrations

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

(b) A, being B's agent with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Consequences of agent's contracts.—A principal cannot disclaim his agent's authority to the detriment of the other party. The principal cannot escape responsibility for the acts of his agent done in the ordinary course of his business, although the agent has acted under a misapprehension²⁰. The liability of a principal on a contract entered into by his agent within the terms of his authority cannot be affected by the unknown motives by which the agent is actuated in making the contract, e.g., that the agent has acted in his own interests and not in those of the principal. "Whenever the very act of the agent is authorised by the terms of the power, i.e., whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used; such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to enquire into facts *aliunde*. The apparent authority is the real authority"¹. When a buyer of goods by description refuses to take delivery of the consignment on the ground that part of it does not answer the description but takes delivery on the promise by the agent that he would take back the

18 *Tunney v. Midland Ry. Co.*, LRICP 291.

19 *Brocklebank v. Noor*, (1938) 1 Cal. 216; *Graham v. Glasgow Corp.*, 1947 AC 368; *Coolfar v. Coggins & Griffith*, 1945 AC 197.

20 *Fazal Ilahi v. E. I. Ry.*, 43 A 623.

1 *Hambro v. Burnand*, (1904) 2 KB 10; *Bank of Bengal v. Fagan*, 7 Moo PC 61 *reftd.* to, *Bryant v. Quebec Bank*, 1893 AC 170 cited: *Shree Gopal v. Sashee*, 60 C 11; *Stocking v. Tata Iron Works*, 41 IC 175.

part not answering the description and return its value, the seller would be liable to the buyer on the promise of the agent which was for the benefit of the seller².

It cannot be disputed that every act done by an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority binds the principal unless the agent is in fact not authorised to do the particular act, and the person dealing with him has notice that in doing such an act he is exceeding his authority³. In a question between a principal and a third party, who has no doubt dealt *bona fide* with the agent, the true limit of the agent's power to bind the principal is the apparent authority with which the agent is invested. In the absence of express authority a party who is employed to find a purchaser for an article is not authorised to receive the price, much less to take in exchange another article⁴. Where the plaintiff tendered a consignment of fireworks for despatch by a passenger train, which was accepted by an employee of the railway company, and after some delay it was sent by goods train as it should be under the rules, in accepting the goods the employee was acting within the scope of his employment, the railway company could not disclaim the authority of their agent, they could not make any extra charge and were liable for the delay⁵. But possession of the servant is not necessarily possession of the master⁶. Where through the mistake of the booking clerk a lower rate was charged for goods booked for carriage by rail, the company was deemed to be bound by the contract entered into by its agent. The consignor was not responsible for the mistake made by the clerk in not charging according to the tariff rate⁷, nor can the company, once having accepted the consignor's goods alter the basis of calculation of freight, *e.g.*, from wagon rate to maund rate⁸. A railway company cannot charge more to one person than to another. The amount so charged may be recovered as money had and received⁹. Consent decree passed against an agent is to be taken as passed against the principal¹⁰. Where principal has to pay for goods before obtaining delivery, he will be liable for the amount of demurrage on his refusing to pay when goods were despatched¹¹. Where a patient admitted to a Nursing Home, without being given any warning of a previous case of infection in the Home, caught the infection, she was entitled to recover damages¹². The driver of a cab is to be considered as the servant or agent of the proprietor for whom.

2. *K. H. etc. Cottage Industries Soc. v. Radhelal*, AIR 1971 MP 191, 193-94.

3. *Katyayani v. Port Canning*, 19 CWN 56.

4. *Livesey v. Campbell*, 1 ALJ 124.

5. *Fazal Ilahi v. E. I. Ry.*, 19 ALJ 654.

6. *Suraj v. Emp.*, 1938 A 513.

7. *Chhoteylal v. R. K. Ry.*, 54 A 557.

8. *Dalip v. Secretary of State*, 148 IC 610.

9. *L. & N. W. Ry. v. Evershed*, 3 AC 1029, but see *Stone & Co. v. M. Ry.*, (1904) 1 KB 669.

10. *Chettiar v. Off. Assignee*, 1940 M 837.

11. *Bhawani v. Chajju*, 1937 A 276.

12. *Lindsey C. C. v. Mary*, 1937 AC 97.

in the exercise of his employment as driver, the proprietor is answerable¹³. But where an agent, by contracting personally, has rendered himself personally liable for the price of goods bought on behalf of his principal, he has the same rights with regard to the disposal of the goods and with regard to stopping them *in transitu* as he would have had if the relation between him and his principal was that of buyer and seller¹⁴. An employer is not liable for the acts of an independent contractor unless, owing to the latter's failure to take proper care, damage is caused to the property, in the vicinity, of a third person¹⁵. A corporation is not liable for the act of an officer over whose duties it has no control¹⁶.

It may be conceded that one and the same man acting as an agent for two principals may by his act alone bind his principals in certain circumstances, e.g., a commission agent, acting as the seller and purchaser of goods, may purchase for one party goods brought to him for sale by another party. But where two companies had a common agent and it was not the business of one of those companies to lend money, the act of the agent in lending out money of this company to another was unauthorised. The latter company is liable to restore the benefit on the principle involved in S. 70 if the former company admits that what was done by their agent was done lawfully¹⁷. The personal knowledge of the agent is not the knowledge of both the companies, in the absence of a duty to communicate. A servant can bind his master only in three cases : (i) where he is specially authorised to do so ; (ii) where he is entrusted with duties for the due discharge of which authority to make such contracts is usual or necessary ; and (iii) where third persons have reason to believe from his master's conduct that he has authority to bind his master. Honest belief in the existence of authority of the agent would be a *bona fide* belief and nothing would be *bona fide* unless it was done with due care and attention¹⁸.

The ordinary law of agency as stated in the section applies to negotiable instruments. A promissory note executed by a person under the authority of another is valid and binding on that other person¹⁹. Where an agent enters into a transaction on behalf of his principal, it is immaterial whether he pays for the things bought by cheque signed by him personally or on behalf of his principal²⁰. Where an agent carries out a transaction in his own name the principal must establish the agency distinctly in order to be entitled to sue in respect of the transaction¹. It is true that in exceptional cases the agent may sue, but that is not the general law. Where the principal

13 *Bombay Tramway Co. v. Khairaj*, 7 B 119, case of tort

14 *Harparshad v. Jinder*, 15 L 496.

15 *Honeywill v. Larkin*, (1934) 1 KB 191 : (1933) All ER Rep 77.

16 *Balthazar v. M. C.*, 1935 R 439.

17 *Upper India Rice Mills v. Jaunpur Sugar Factory*, 25 ALJ 277. old Art 62 of the Limitation Act would apply ; *Sree M. Mills v. Rati*, 1941 B 108.

18 *Parsram v. J. B. Ry.*, 134 IC 385.

19 *Challa v. Kanuparthi*, 40 M 1171.

20 *Ram v. Emperor*, 1942 O 473.

1 *Sing v. Bond*, 5 B & Ad 389.

sends goods by rail to his commission agent, the latter has no *locus standi* to sue the railway company for damages for non-delivery of the goods. The endorsement of the railway receipt to the agent does not do anything more than give him a right to obtain delivery of the goods². An action by the agent of one party against the agent of another must fail for want of privity of contract between the parties to the suit³.

227. Principal how far bound when agent exceeds authority.—When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Illustration

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

1. The section.—The general rule is thus laid down by Lord Coke: "Regularly it is true, that where a man doth less than the commandment or authority committed unto him there (the commandment or authority being not pursued) the act is void. And where a man doth that which he is authorised to do and more, there it is good for that which is warranted and void for the rest. Yet both these rules have diverse exceptions and limitations"⁴. The section deals with the latter part of the rule and says that if the agent's acts be severable the principal will be bound by the acts of the agent which are within the scope of the latter's authority. If the acts be not severable the case comes under S. 228 and the principal is not bound. When the defendant, a stock jobber ordered a broker to buy a certain number of shares and the broker bought a much larger number of shares on behalf of the defendant and other principals, privity of contract was established between the plaintiff vendor and the defendant. The usage of the stock exchange by which the broker is permitted to lump together the orders of his clients and to execute them as one transaction with the jobber does not prevent a contractual relationship arising between the jobber and the broker's principal⁵. Where a shroff was engaged to examine and pass only *babashai* silver coins and not to accept *Shikkai* coins, any of the latter coins accepted by the agent was contrary to the directions given to him by his principal and therefore was not binding on the principal⁶.

² *Maula Baksh v. Secretary of State*, 119 IC 731.

³ *Depperman v. Hubbersty*, 17 QB 766.

⁴ Co. Lit. 258 a. cited in *Story on Agency*, p. 166 and in *Baines v. Ewing*, LR 1 Ex 320, C & S 527.

⁵ *Scott v. Godfrey*, (1901) 2 KB 726; *Robinson v. Mollett*, LR 7 HL 802 distgd.; *Mayandi v. Raman*, 1937 R 499.

⁶ *Chunilal v. Secretary of State*, 35 B. 12.

228. Principal not bound when excess of agent's authority is not separable.—Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction.

Illustration

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

1. The section.—In *Baines v. Ewing*⁷, an insurance broker was authorised to underwrite policies up to £100 but he underwrote a policy for £150, it being notorious that a limit was always put to the amount for which a broker could underwrite, the broker having exceeded the limit, and the contract being indivisible, the principal was not liable even to the extent of £100. Where a principal instructed his agent to enter into a contract for the delivery of cotton at the end of *Kartik* but the agent entered into a contract for its delivery by the middle of that month, it was held that the agent had exceeded his authority in such a manner as to exempt the principal from liability upon the contract. A custom which allows a broker to deviate from his instructions is unreasonable and the court will not enforce it⁸. A firm of carriers authorises one of its partners to draw bills on the firm to the extent of Rs. 200, the partner, in excess of this authority, made two promissory notes in the name of the firm for Rs. 1,000 each, the firm was not liable for Rs. 200 even, as the contract was not capable of division. The principle on which a principal may, in certain cases, be held bound by the acts of his agent in excess of the agent's authority is that the principal has by his words or conduct induced a third person to believe that the agent's acts were within the scope of his authority⁹. The reference is to the special rule of law, namely, that if you entrust a man with the indicia of title, and also give him actual though limited authority to deal with them, the person who deals with him in good faith and without notice and with ignorance of the limitations is not affected by the limitations. A person receiving a document with a blank transfer is not put on inquiry as to the authority of the person presenting the document for the purpose of raising a loan. Where an agent in contravention of his instructions borrows upon shares, endorsed in blank, a less sum than the stipulated amount, the lender can retain the documents till the amount borrowed is repaid¹⁰. If a person deals with a known agent endowed with a limited authority and power, he is bound to ascertain the scope of the agent's authority, otherwise, if such a person deals with such an agent, and the agent exceeds the limits of his authority, and the person so dealing with him incurs loss or damage by reason of the agent exceeding

⁷ LR 1 Ex 320.

⁸ *Arlapa v. Kesharji & Co.*, 8 BHCR AC 19.

⁹ *Premabhai v. Brown*, 10 BHCR 319.

¹⁰ *Fry v. Smellie*, (1912) 3 KB 282.

his authority, then such a person cannot hold the principal liable for the acts of the agent done outside and beyond the scope of his authority¹¹. Where an agent carrying on business on behalf of his principal under a power of attorney was not authorised to speculate in gunnies etc., and the agent under the power signed a bought note for the purchase of sugar, the transaction was outside the terms of the express prohibition and the principal, therefore, was not liable¹². A mere power to sue authorises an agent to employ a wakil on the terms of paying him a reasonable remuneration. A promise to pay a larger sum in the event of success, for the chance of having to pay nothing if the wakil fails to win, is an agreement which the agent cannot enter into without express authority from his principal¹³. A banker who pays a forged cheque is in general bound to pay the amount over again to the customer, because he pays without authority unless the customer be guilty of negligence¹⁴. Where an agent does an act exceeding his authority, and the principal on being apprised of the fact fails to communicate to the agent his determination not to be bound by it within a reasonable time, it must be presumed that there was implied ratification¹⁵. The illustration says that the principal may repudiate, if he does not he will be bound.

229. Consequences of notice given to agent.—Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Illustrations

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

1. The section.—Similar provision is contained in S. 4 of the Transfer of Property Act. These enactments are declaratory of a general principle of law. "That principle is in a special sense applicable to legal proceedings which are usually conducted through an agent. It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes

¹¹ *Stocking v. Tata Iron Works*, 41 IC 175.

¹² *Angullia & Co. v. Sasoon & Co.*, 16 CWN 593.

¹³ *Keshav v. Narayan*, 10 B 18.

¹⁴ *Bhagwan Das v. Crest*, 31 C 249.

¹⁵ *Sultan v. Muhammad*, 122 IC 501, *refing to Lakshmunan v. Chidambaram*, 49 IC 758; *Ramasami v. Karuppan*, 29 MLJ 551.

the knowledge of the agent to the principal, or (in other words), the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings¹⁶. In other words, a principal is only bound by the knowledge of his agent where that knowledge is on a material point, and it was such that the agent, in the opinion of the court, was bound to communicate to his principal¹⁷. Knowledge of an agent, not acquired in the matter for which he was an agent, cannot be imputed to the principal, for it cannot be said to have been acquired in the course of the business transacted by the agent for the principal, so it cannot be used to upset a transaction of a date before the agency commenced¹⁸.

2. English and Indian Law.—Whatever an agent does within the scope of his employment, and whatever information comes to him in the course of his employment as agent, binds the principal. Where an agent is employed to buy, the principal is affected by all the knowledge acquired by the agent which would have affected the principal if he had conducted the transaction himself. Anything which comes to the knowledge of the agent in the course of the transaction binds his principal; but the principal is not bound by any knowledge previously possessed by the agent¹⁹. The court of appeal, however, did not subscribe to the limitations on the doctrine imposed by the court below and it stated as its view "that in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal"²⁰. Apparently the view of the original court has been adopted in the section.

3. Illustrations.—The act of the agent ought to bind the principal, because it must be taken for granted that the principal knows whatever the agent knows¹. In *Gladstone v. King*², the master omitted to communicate when writing to the owner the fact of the ship having been driven on a rock, and it was held that the captain was bound to communicate the fact, and for want of such communication the antecedent damage was an implied exception from the insurance and the owner could not recover the loss arising from the sum spent on repairs rendered necessary by the accident. If an agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship or a cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance,

16 *Rampal v. Balbhaddar*, 29 IA 203, 212.

17 *Pingle v. Padampat*, 1950 B 76.

18 *Chabildas v. Dayal*, 34 IA 179, 184; *Wells v. Smith*, (1914) 3 KB 722, 725.

19 *Dresser v. Norwood*, 14 CBNS 574, 587; see *illust. (b)*.

20 *Dresser v. Norwood*, 17 CBNS 466.

1 *Fitzherbert v. Mather*, 1 TR 12, 16; *Baldwin v. Casella*, LR 7 Ex 325; *Truman's Case*, (1894) 3 Ch 272; *Brewin v. Briscoe*, 28 LJQB 329.

2 1 M & S 35.

such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge³. The act of the master of a vessel in loading cargo in violation of a statute⁴, or in taking such passengers as to incur a penalty⁵, without the owner's knowledge, does not vitiate the policy of insurance. The agent of an insurance company in filling in a proposal form acts as the agent of the proposer, the knowledge acquired by him, therefore, cannot be imputed to the insurance company which is entitled to repudiate the contract on the ground of the statements in the proposal form being untrue⁶. As has been said, knowledge of the agent cannot be imputed to the principal when a person makes to the agent a statement untrue to his knowledge to induce the principal, whom he does not believe to know its untruth, to act upon it in ignorance and to his damage⁷. Where a solicitor induced first one client and then another to invest money on the mortgage of the same piece of land, the mortgage of the second client was with notice of the earlier mortgage⁸. A person who ought according to the rules of the courts of equity, either personally or by his agent, to have known a fact is treated in equity as if he actually knew it, he cannot escape the consequences of this constructive notice by employing the dishonest solicitor of the other party with whom he is dealing if the true fact would have come, or ought to have come, to the knowledge of an independent solicitor in case such a solicitor had been employed. No one by relegating to an agent to do what he might do himself can place himself in a better position than if he did the thing himself. If notice to the agent were not notice to the principal, notice would be avoided in every case by employing agents⁹. The question whether the knowledge or act of an agent can be attributed to his principal depends upon the terms of the authority that the agent has received¹⁰. In order to affect the principal with constructive notice it is necessary to show not only that the knowledge of the agent was derived from the same transaction but that the knowledge was of a fact material to the transaction, something which it was the duty of the agent to make known to his principal¹¹. An intimation by the buyer to the seller's agent of the fact of his part rejection of the goods sold is due intimation to the principal himself¹². Officers of a bank who carry on its business are

3 *Proudfoot v. Montefiore*, LR 2 QB 511.

4 *Wilson v. Rankin*, LR 1 QB 162.

5 *Dudgeon v. Pembroke*, LR 9 QB 581.

6 *Newsholme Bros. v. R. T. & G. Insee. Co.*, (1929) 2 K. B. 356 : (1929) All ER Rep 442 distating *Bowden v. L. & C. Assce. Co.*, (1892) 2 QB 534; *Lakshmi v. G. L. A. Society*, 1932 B 582.

7 *Wells v. Smith*, (1914) 3 KB 722 : 83 LJ KB 1614 : 111 LT 809.

8 *Rolland v. Hart*, LR 6 Ch 678 ; as to such constructive notice, see *Le Neve v. Le Neve*, 2 Wh & TLC 157.

9 *Berwick & Co. v. Price*, (1905) 1 Ch 632.

10 *Blackburn v. Vigors*, 12 AC 531, reld. to in *Stocking v. Tata Iron Works*, 41 IC 175.

11 *Wyllie v. Pollen*, 32 LJ Ch 782.

12 *K. H. etc Cottage Industries Soc. v. Radhalal*, AIR 1971 MP 191.

more than mere agents. Any information which they receive relating to transactions carried on by them on behalf of the bank must be regarded as information received by the bank¹³. When an agent of a bank knew that a certain person dealing with the bank was a warehouseman as well as a merchant but he withheld this knowledge from the bank this knowledge could be imputed to the bank¹⁴. Notice to the solicitor is notice to the client. Where a purchaser employs the same solicitor as the vendor, he is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser in the transaction in which he is so employed. Notice to the solicitor which will bind the client must be notice in that transaction in which the client employs him unless the second transaction follows so closely upon the earlier transaction that the former cannot have been out of the mind of the solicitor; in such a case the notice to the client will not be restricted to the later transaction only¹⁵.

4. Exceptions to the rule.—Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions and knowledge of the principal. Other agents may have so limited and narrow an authority that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge and intentions of the principal. Thus, knowledge acquired by a broker employed in effecting an insurance does not amount to knowledge of the principal. His position is different from that of a master or ship agent. For instance, where knowledge is acquired by one broker but the insurance effected by another, the policy is not affected by the knowledge acquired by the first broker not communicated to the principal¹⁶. Knowledge of the agent does not amount to knowledge of the principal where there is no legal duty on the part of the agent to impart his knowledge, nor any duty on the part of the principal to have acquired the knowledge¹⁷. Knowledge not acquired in the course of agency is immaterial and cannot be imputed to the principal¹⁸. A fact which comes within the knowledge of man as secretary of one company is not notice to him as secretary of the other company from the mere existence of the common relationship. What the court has to see is whether the information he gets, as secretary of the one company, comes to him under such circumstances as that it is his duty to communicate it to the other company¹⁹. Thus, where notice was given of a fact casually to a secretary of a company relating to the affairs of a deceased person while the secretary was attending the funeral of the deceased, notice to the secretary did not amount to notice to the company²⁰. Knowledge of a director of a company is not knowledge

13 *Co-operative Bank v. Shanmugam*, 125 IC 365.

14 *Nandlal v. Bank of Bombay*, 12 Bom LR 316.

15 *Fuller v. Bennett*, 2 Hare 394, 402.

16 *Blackburn v. Vigors*, 12 AC 531, 540.

17 *Young v. Payne & Co.*, (1904) 2 Ch 608, 619, reld. to in *Texas & Co. v. Bombay Banking Co.*, 46. IA 250; *Powles v. Page*, 3 CB 16.

18 *Wilde v. Gibson*, 1 HLC 605, 625, 635 : (1843-60) All ER Rep 494.

19 *Re Fenwick*, (1902) 1 Ch 507; *Re Hampshire Land Co.*, (1896) 2 Ch 743, *fold in* *Houghton v. Nothard*, 1928 AC 1 : (1927) All ER Rep 97.

20 *Societe Generale v. Tramways Union*, 14 QBD 424, 450.

of a banking company of which he is a shareholder¹. Notice to the Bank of England in London has been held to operate as notice to its branch bank². Where a firm consists of several persons the knowledge of one is the knowledge of all³.

There is undoubtedly an exception to the imputation of notice from the agent to the principal where the agent is guilty of the commission of a fraud, which would require the suppression of the knowledge from the principal upon whom the fraud was committed by the agent⁴. In such a case it is not to be presumed that the agent disclosed the fact which came to his knowledge⁵. The principal is not to be affected with constructive notice of a fraud committed by his agent, but the constructive notice of the existence of a fact may be imputed to him, whether there is a fraud relating to it or not⁶. Notice to a solicitor of a transaction, and about a matter as to which it is a part of his duty to inform himself, is actual notice to the client. But the mere fact of the solicitor not having communicated an important circumstance is not of itself evidence of fraud. It must be made out that distinct fraud was intended in the very transaction so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him⁷. When an agent conceals from his master information which he has, he is guilty of fraud and the master cannot possibly be held to have the information and cannot be fixed with knowledge of things which were fraudulently concealed from him by his agent⁸. But where an offer was accepted within the time stipulated, the negligence of the agent in communicating with his principal did not avoid the contract⁹. "Notice of facts to an agent is constructive notice thereof to the principal himself where it arises from, or is at the time connected with, the subject matter of his agency." It is quite open to the parties to stipulate that this presumption which arises upon general principles of public policy should not arise in any particular case, and that notice instead of being served on an agent would have to be served on the principal himself¹⁰. The doctrine of constructive notice cannot be so extended as to impute to the principal the knowledge of an agent, not acquired in the matter for which he was agent, nor can the doctrine be used to upset a transaction of a date before the agency commenced¹¹. Any knowledge on the part of an agent prior to his employment as such agent would not amount to information of

1 *Mayhew v. Eames*, 3 B & C 601.

2 *Willis v. Bank of England*, 5 Ad & E 21.

3 *Powles v. Page*, 3 CB 16; *Jacaud v. French*, 12 East 317.

4 *Cave v. Cave*, 15 Ch D 639, 644; *Kennedy v. Green*, 3 My & K 699 : (1824-34) All ER Rep 727 : 40 ER 266; *Re Fitzroy Bessemer Steel Co.*, 50 LT 144; but see *Bradley v. Riches*, 9 Ch D 189.

5 *Waldy v. Gray*, LR 20 Eq 238, 251; *Hormasji v. Mankuvarbai*, 12 BHCR 262.

6 *Boursot v. Savage*, LR 2 Eq 134, 142; *Dixon v. Winch*, (1900) 1 Ch 736, 746;

Atterbury v. Wallis, 25 LJ Ch 792; *Re Weir*, 58 LT 792.

7 *Rolland v. Hart*, LR 6 Ch 678.

8 *Raja Shivlal v. Tricumdas Mills*, 36 Bom 564, 585.

9 *Wright v. Bigg*, 15 Beav 592 : 51 ER 668.

10 *R. S. Navigation v. Bissessar*, 116 IC 148.

11 *Chabildas v. Dayal*, 6 CLJ 674 PC.

the fact obtained by the agent in the course of the business transacted by him as an agent so as to operate as a notice to the principal¹². Notice to the agent in notice to the principal and fixes him with knowledge whether it is communicated to him or not except where there has been a fraud on the part of the agent¹³. If the agent has an interest which would lead him not to disclose to his principals the information which he has obtained, and in point of fact he does not communicate it, knowledge cannot be imputed to the principals¹⁴.

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.—In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to the contrary.—Such a contract shall be presumed to exist in the following cases :—

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :

(2) Where the agent does not disclose the name of his principal :

(3) Where the principal, though disclosed, cannot be sued.

1. The section.—The rule is that a principal may sue on a contract made in the name of his agent. The name in which a contract is made is *prima facie* evidence of the party for whom the contract is made, but it is not conclusive¹⁵. The general rule, as pointed out by Story in his Agency, Ss. 261, 263, is that "an agent contracting in the name of the principal and not in his own name is not entitled to sue, nor can be sued, on such contracts." Therefore, where credit is exclusively given to the principal the agent cannot be held personally liable. Thus, an agent, *e.g.*, a broker, cannot sue in his own name upon contracts made by him as agent, though in certain contracts an agent may himself sue as principal¹⁶. Where an agent signs as agent by telegraphic authority of principals (named) the agent is not liable for mistakes in the message as transmitted¹⁷. If under a contract entered into by an agent, even in his own name, the interest in the subject matter of the contract vests in the principal, he can sue on it in his own name. Evidence may be given

12 *Gunabai v. Motilal*, 89 IC 625, 629.

13 *Rasila v. Haveli*, 119 IC 754.

14 *Re David Payne & Co.*, (1904) 2 Ch 608, cited in *The Hayle*, 1929 P 725.

15 *Cooke v. Seeley*, 17 LJ Ex 286 : 154 ER 691 : 2 Exch 746.

16 *Fairlie v. Fenton*, LR 5 Ex 169 ; *Fawkes v. Lamb*, 31 LJQB 98.

17 *Lilly v. Smales*, (1892) 1 QB 456.

to show that the agent named in the contract has no interest under it¹⁸. An agent cannot sue on a contract entered into on behalf of his principal when the agent takes upon himself no liabilities under the contract, for there is no consideration between the agent and the party sued¹⁹, but an agent having an interest in the contract may sue in his own name²⁰. The pleader being the agent of the client, a suit is not maintainable against him alone¹.

The ordinary rule is that an agent cannot sue in his own name on behalf of a principal. If he may do so in a particular case it is an exception to the rule. The section provides for three such exceptions, namely, (i) where the contract is made for a foreign principal; (ii) where the agent does not disclose the name of the principal; and (iii) where the principal though disclosed cannot be sued. Except in the above cases the agent cannot personally enforce contracts made by him on behalf of his principal². When there are funds in the hands of an agent belonging to his principal, who gives a mandate to the agent to deliver them in extinguishment of an obligation (of the principal) to a third party, when that mandate is communicated to the creditor there arises on the part of the agent an obligation on which apparently he can be sued both in law and equity³. The following rules laid down in *Montgomerie v. United Kingdom M. S. Association*⁴ will be found to be closely analogous to those laid down in the section: The general rule as regards an agent is that where a person contracts as agent for a principal the contract is the contract of the principal and not that of the agent; *prima facie* at common law the person who may sue is the principal and the only person who can be sued is the principal. To that rule there are, of course, many exceptions. First, the agent may be added as a party to the contract if he has so contracted and is appointed as the party to be sued. Secondly, the principal may be excluded in several other cases. He may be excluded if the contract is made by a deed *inter partes* to which the principal is no party (a peculiar rule of English law). Another exception is as regards bills and notes. If a person who is an agent makes himself a party in writing to a bill or note by the law merchant a principal cannot be added⁵. Another exception is that by usage, which is treated as forming part of the contract, where there is a foreign principal, generally speaking the agent in England is the party to the contract and not the foreign principal; but this is subject to certain limitations. Then a principal's liability may be limited, though not excluded. Again, where the principal is an undisclosed principal, he must, if he sues, accept the facts as he finds them at the date of his disclosure,

18 *Cave v. Mackenzie*, 46 LJ Ch 564; see *Rochefoucauld v. Boustead*, (1897) 1 Ch 196.

19 *Evans v. Hooper*, 1 QBD 45; *Repetto v. Miller's &c. Forests*, (1901) 2 KB 306; 70 LJ KB 561; 84 LT 836; *Pigott v. Thompson*, 3 B & P 147.

20 *Hardayal v. Kishan*, 1938 L 673.

1. *Bidhu v. Ahmed*, 42 CWN 1263.

2. *Subramania v. Narayanan*, 24 M 130.

3. *Anathachari v. Ratnam*, 45 MLJ 83, 88.

4. (1891) 1 QB 370.

5. See post, *Sadasuk v. Sir Kishan*, 29 CLJ 340; *Bakdas v. Tanabai*, 118 IC 673.

so far as those facts are consistent with reasonable and proper conduct on the part of the other party. Further if the principal is sued, he is entitled to an allowance for payments which he may have made to his agent if the other party gave credit originally to the agent. Also, in all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal. Where there is a matter of doubt as to the liability of the agent or the principal in a contract, the usual course is to sue them both, alleging that the principal was the principal to the contract, in the alternative suing the agent for breach of warranty of authority⁶.

2. **Contract to the contrary.**—It is from the circumstances of the case, that in the case of an oral contract, it is to be made out whether a party is contracting for himself as principal or merely as an agent⁷. And in the case of a written contract the question whether the principal or the agent is liable, or both are liable, depends on the construction of the document with reference to the circumstances of the case⁸. The true inference from the course of business may be that a party doing commission business is to be personally liable for losses on constituent consignments⁹. A party who executes an instrument in the name of another, whose name he puts to the instrument and adds his name only as an agent for that other, cannot be treated as a party to that instrument and be sued upon it, unless it be shown that he was the real principal¹⁰. If a man describes himself in the beginning of an agreement for the grant of a lease, as making it on behalf of another, but in the subsequent part of it says that he will execute the lease, he is personally liable¹¹. A contract signed by J. B. J., "For the A. B. Co., Copenhagen" does not make the agent liable under the contract¹². When the directors of a company signed a contract thus: "We, the undersigned, three of the directors, agree to repay £500 advanced by A to the company," and assigned to A, as security, certain property of the company, the directors were personally liable¹³. Where a broker sent a note in these terms, "Messrs. S.—I have this day sold by your order and for your account to my principals &c., one per cent, brokerage," he was not liable for the value of the goods sold¹⁴. If the agents sign a contract, they will be liable, even if the principal be named, if the terms of the contract be not inconsistent with the personal liability

6 *Raghunath v. Kesori*, 150 IC 671.

7 *Williamson v. Barton*, 7 H & N 899; *Long v. Millar*, 4 CPD 450: (1874-80) All ER Rep 556.

8 *Weidner v. Hoggett*, 1 CPD 533; *Jones v. Littleddale*, 6 LJKB 169.

9 *Smith v. Peerbhoy*, 59 MLJ 341 PC.

10 *Jenkins v. Hutchinson*, 13 QB 744; *Carr v. Jackson*, 7 Ex 382; *Railton v. Hodgson*, 15 East 67; *Adams v. Hall*, 37 LT 70; *Bowstead*, Art 121.

11 *Norton v. Herron*, 1 C & P 648; *Tanner v. Christian*, 24 LJQB 91.

12 *Kimber Coal Co. v. Stone*, 1926 AC 414, see cases cited; *Redpath v. Wigg*, LR 1 Ex 335; *Universal S. N. Co. v. Mc Kelvie*, 1923 AC 492.

13 *Mc Collin v. Gilpin*, 6 QBD 516.

14 *Southwell v. Bowditch*, 1 CPD 374.

of the agent¹⁵. So a solicitor undertaking to pay on behalf of his clients a portion of certain expenses¹⁶, or giving an undertaking on behalf of the clients¹⁷, is personally liable.

An agent is liable personally if he really be the contracting party and he may be so though he names his principal. The mere fact that an agent describes himself as "agent for X" is not enough to rebut the inference of personal liability arising from the rest of the contract¹⁸; but the words "as agent" or "on account of" show that a man is making a contract on behalf of someone else, and that he is not binding himself but is binding his principal. The words "as agents" can hardly be treated as words of description. A man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description¹⁹. "The appending of the word "agent" to the signature is a conclusive assertion of agency and a conclusive rejection of the responsibility of a principal." The agent is thereby absolved from all responsibility in the matter of the contract²⁰. There is no distinction between the words "on account of" and the words "on behalf of." These words being in the body of the contract, the agent cannot be held personally liable, it is immaterial whether they occur under the signature or not¹.

A signed certain letters purporting to emanate from the Military Secretary. Those letters he signed "for the Military Secretary". It was held that he was not acting as the agent of the ex-Ruler of Jaipur, but was performing the ministerial act of signing the letters on behalf of the Military Secretary².

Where directors signed a promissory note as "directors of the Royal Bank of Australia, for ourselves and the other shareholders of the said company", as they did not expressly state that they were acting on behalf of the company they were personally liable³. If after the signature of persons on a bill of exchange or promissory note there is added the word, "directors," or similar forms of description, but they do not state on the face of the document that they are acting on account of or on behalf of the company, the word so added is a word of description only and the signatories are individually liable⁴. But where the signature of the managing director has been added merely as indicating a person by whom the name of the company was affixed, or as otherwise validating the making of the note in the name of the company, the managing director is not personally liable but the company is liable⁵.

15 *Parker v. Winlow*, 27 LJQB 49.

16 *Hall v. Ashurst*, 1 C & M 714.

17 *Harper v. Williams*, 12 LJQB 227. 114 ER 880. Bowstead, Art 118.

18 *Parker v. Winlow*, 7 E & B 942.

19 *Gadd v. Houghton*, 1 Ex D 357; *Paice v. Walker*, LR 5 Ex 173 disapproved: *Dhirendra v. Nutbehary*, 37 CWN 296; *Mookan v. Muthayya*, (1938) 1 MLJ 63.

20 *Universal S. N. Co. v. Mc. Kelvie*, 1923 AC 492, cited in *Hari v. Becha*, 89 IC 380; *Ganpat v. Campbell & Co.*, 32 Bom LR 1336.

1 *Ogden v. Hall*, 4 LT 751; *Gadd v. Houghton*, 1 Ex D 357.

2 *Mohanlal v. Sawaj Man Singhji*, AIR 1962 SC 73.

3 *Penkivil v. Connell*, 19 LJ Ex 305; *Bottomley v. Fisher*, 31 LJ Ex 417.

4 *Elliott v. Bax-Ironside*, (1925) 2 KB 301.

5 *Chapman v. Smethurst*, (1909) 1 KB 927.

The general rule is that where parties, in signing an instrument, describe themselves as directors of a company, but do not state that they are acting on behalf of the company, they are individually responsible. On the other hand, if they state that they are acting on behalf of the company, they are not liable. The affixing of the seal of the company makes no difference⁶.

There is no doubt that a person, acting for and on behalf of another, may contract in such terms as to bind himself personally. In each case the question is whether the intention that he should do so appears. One test is to see who is by the provisions of the contract to act in the performance of it. In each case of this kind one must look to the terms of the instrument in order to discover the intention of the parties⁷. An agent may be personally liable and where he has signed a contract he is estopped from saying that he did not contract personally. If an agent enters into a contract in his own name, and has a principal, those whom he contracts with will have the responsibility both of the principal and of the agent⁸. The rule of law is that where a person signs a contract in his own name, without qualification, he is *prima facie* to be deemed to be a person contracting personally, and in order to prevent his liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal. The words "as agents for charterers" do not in themselves make that intention apparent⁹. The form of an agreement or the mode of signature may indicate that an agent did not sign for himself as principal and he will not be personally liable in such a case. It would require extremely strong words in the body of the contract to control the effect of that mode of agreement or signature¹⁰.

Where agents sign agreements without any qualification showing that they sign as agents only, they will be personally liable, even where they are referred to in the body of the contract as agents for others¹¹, though such decisions are inconsistent with others¹². On the other hand, where the agents are described in the body of the agreement and in the signature as agents for known persons, they have been held not to be liable. Such qualifications of the signatures should be taken as deliberate expression of intention to exclude any personal liability on the part of the signatories¹³. In a case where a man is by profession an agent of a particular firm and describes himself as such, he may still be contracting in his personal capacity, but the mere fact that he fails to specify his capacity as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are clearly to the contrary¹⁴.

6 *Dutton v. Marsh*, 40 LJQB 175.

7 *Tanner v. Christian*, 4 E & B 591.

8 *Calder v. Dobell*, LR 6 CP 486.

9 *Hough v. Manzanos*, 4 Ex D 104; *Mookan v. Muthayya*, 1938 M 146.

10 *Deslandes v. Gregory*, 30 LJQB 36 on app. from 29 LJQB 93.

11 *Paice v. Walker*, LR 5 Ex 173; *Parker v. Winlow*, 7 E & B 942.

12 *Southwell v. Bowditch*, 1 CPD 374; *Gadd v. Houghton*, 1 Ex D 357, as pointed out in the next case.

13 *Universal S. N. Co. v. Mc. Kelvie*, 1923 AC 492.

14 *Bhargava v. Kobayashi*, 65 IC 468.

Where there is a written agreement on the fact of which the seller represents himself as the principal, it is not competent for him to discharge himself from liability by showing that he was agent only¹⁵. But the case is different where the written agreement is not the contract between the parties, e.g., where the contract is by parol, and the agreement is not written out until long after, in which case the parties are not estopped by the written agreement from showing what the real transaction was¹⁶. An agent upon a *del credere* commission is in the same position as any other agent. He cannot sue the vendor in his own name for a debt contracted between the principal and the vendee¹⁷.

Although an agent may be excluded from personal liability by the terms of a written contract, he will, nevertheless, be liable if a custom of the trade can be established making him personally liable in the particular case, provided the custom does not contradict the written agreement¹⁸. There is no doubt that with respect to a commercial contract it has been long established that evidence of a usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent. That with regard to particular commercial usages evidence is admissible to engraft terms with the contract or to explain its terms. In *Humfrey v. Dale*¹⁹ it was held that not merely a term, but a party, on oral evidence of custom may be added to a contract in writing²⁰. The contract itself cannot be contradicted¹, but a term not inconsistent with the terms of the contract may be added². A custom inconsistent with the terms of the contract is not admissible³. Where a contract entered into by the respective agents binds the principals, e.g., a contract by brokers for unnamed principals, the agents themselves may be liable under the contract by usage of trade⁴. A broker, as such, merely dealing as a broker, whether his principal is named or unnamed, is not liable on the contract if the principal fails to fulfil his contract. Evidence of custom, not inconsistent with the written contract, is admissible to show that in the London fruit trade if the broker does not disclose his principal's name on the contract he is personally liable⁵.

3. **Foreign principal.**—There is a general or special custom that when an agent acts on behalf of a foreign principal he undertakes the liability of

15 *Higgins v. Senior*, 8 M & W 834 : (1835-42) All ER Rep 602.

16 *Holding v. Elliott*, 5 H & N 117 : 157 ER 1123, see *Jones v. Littledale*, 6 LJKB 169.

17 *Bramwell v. Spiller*, 21 LT 672.

18 *Pike v. Ongley*, 18 QBD 708 refd. to in *Universal S. N. Co. v. Mc Kelvie*, 1923 AC 496.

19 7 E & B 266.

20 *Joy Lall v. Monmotha*, 20 CWN 365, see cases refd. to.

1 *Mollett v. Robinson*, LR 5 CP 646.

2 *Hutchinson v. Tatham*, LR 8 CP 482.

3 *Re N. W. Rubber Co. & Huttenbach*, (1908) 2 KB 907.

4 *Humfrey v. Dale*, 27 LJQB 390; *Hutchinson v. Tatham*, LR 8 CP 482.

5 *Fleet v. Murton*, LR 7 QB 126, fold in *Gubboy v. Avestoom*, 17 C 449.

a principal⁶. In the absence of such a custom, and where a principal exists, the general rule applies although the principal be not named or be a foreigner⁷. Where a British merchant is buying for a foreigner, according to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer and not to the foreigner⁸. The great inconvenience that would result if there were privity of a contract established between the foreign constituents of a commission merchant and the home supplier of the goods has led to a course of business in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his (foreign constituent's) credit to those from whom the commission merchant buys by his order and on his account⁹.

A foreign principal according to the usage of the trade, unless there is something in the bargain showing the intention to be otherwise, cannot sue, for he does not authorise the agent to pledge his (principal's) credit to the contract so as to establish privity between him and the home-supplier¹⁰. The agent, therefore, can sue personally. But if the contract be not made by the agent he cannot sue, even if he has, by a separate contract made with the foreign firm, undertaken to pay for all goods supplied by it and not paid for by the purchaser¹¹. Nor can a foreign principal be sued unless there is a contract of partnership between him and the agent, or there is an intention expressed that the foreign principal should be a party¹². The foundation of the custom whereby the agent alone is liable to the exclusion of his principal "is the presumption that the agent has no power to pledge the credit of his foreign principal and, therefore, that the foreign principal is not under any liability to the person with whom the commission agent is contracting. In these cases the only liability of the foreign principal is to his own agent, and the agent is alone liable to the person with whom he makes the contract. If upon the contract, the foreign principal is directly liable to the person with whom the agent contracts, this provision is inconsistent with the custom, and the custom is thereby excluded. So it has been held that where a contract is made by the agent on behalf of "our principals"¹³, or "on account of M & Co. Valencia," the agent is not liable on the contract because there is an intention to make the foreign principal liable¹⁴.

6 *Miller Gibb v. Smith & Tyrer*, (1917) 2 KB 141; *Brandt v. Morris*, (1917) 2 KB 784; (1916-17) All ER Rep 925. For the test to determine whether a company is foreign or resident in the country, see *Lalandia*, 1933 P 56; (1932) All ER Rep 391.

7 *Universal S. N. Co. v. Mc. Kelvie*, 1923 AC 496; *Harper v. Keller*, 84 LJKB 1696.

8 *Thomson v. Davenport*, 9 B & C 78; *Teheran Europe Co. Ltd. v. S. T. Belton (Tractors) Ltd.*, [1968] 1 All ER 886 CA.

9 *Armstrong v. Stokes*, LR 7 QB 598, fold in *New Zealand Co. v. Watson*, 7 QBD 374; *Mahony v. Kekule*, 14 CB 390, cited in *Tutika v. Parry & Co.* 27 M 315.

10 *Elbinger v. Clave*, LR 8 QB 313.

11 *Nasiruddin v. Durga*, 168 IC 458.

12 *Hutton v. Bullock*, LR 9 QB 572.

13 *Miller Gibb & Co. v. Smith & Tyrer*, (1917) 2 KB 141, 150.

14 *Gadd v. Houghton*, 1 Ex D 357, relied on in *Mookan v. Muthayya*, (1938) 1 MLJ

A company registered and incorporated in England but carrying on business in this country is a company resident abroad, therefore it must be presumed that the agents of the company are personally liable upon contracts entered into by the company. But this presumption of law can be rebutted, e.g., when the foreign principal himself is made the contracting party and the contract is made directly in his name¹⁵. Where a firm in this country enters into a contract with a firm of commission agents in another, or through a branch in this country of a foreign firm of commission agents, the firm merely constitutes itself as agent to place the order of the local firm and not as agent of the foreign principals, consequently no action will lie against the agency firm¹⁶. The validity of the appointment of an agent of a foreign company is governed by the law of the foreign company's domicile¹⁷. In *Fazal v. Imperial Chemical Co.*¹⁸ the defendant was held liable either as the principal party or as an agent under sub-sec. (1). A foreign corporation can only be served with a writ of summons through its agent carrying on its business. In order that service on an agent in such circumstances should be treated as service on the foreign corporation, the agent must have power to enter into contracts on behalf of the foreign corporation¹⁹.

4. Undisclosed principal.—The rule of law, no doubt, is that, if the principal is undisclosed, the broker saying "bought of you for my principals" is himself liable, but where the contract says, "sold for you to my principals" i.e., I, your broker, have made a contract for my principals the buyers, the broker is not liable in the absence of usage to the contrary. The real contention in all these cases has been whether the broker has so named himself as to make himself liable as principal. He may no doubt do so, notwithstanding that he describes himself as a broker. It depends upon the form of the contract in each case²⁰. Where the bought and sold notes clearly indicate that the appellant was acting for the disclosed principal, the fact that he (the agent) did not add the relevant description to his signature, or used the word "we" in the operative portion of the letters would not materially alter the fact spoken to by the notes that the appellant was acting on behalf of the disclosed principal. It cannot be suggested that those letters intended to alter the position disclosed by the notes. The letters, like the confirmation slips, are and must be presumed to be consistent with the notes; and so it would be unreasonable to attach undue importance to the signature and to the use of the relevant words "we" and "you". "When a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it as well as the agent with whom the contract is made in the first instance." But that rule

15 *Tutika v. Parry & Co.*, 27 M 315.

16 *Mahomedally v. Schiller*, 13 B 470; *Cassaboglou v. Gibb*, 11 QBD 797, *refd. to.* but, see *Leake*, 8th Ed. p. 376.

17 *Colonial Gold Reef v. Free State Rand.*, (1914) 1 Ch 382.

18 67 IC 157.

19 *Mahomed v. Reliance M. Insce.*, 43 CLJ 576.

20 *Southwell v. Bowditch*, 1 CPD 374.

1 *Radhakrishna v. Tayaballi*, AIR 1962 SC 538, 547.

does not apply where an agent for an undisclosed principal contracts in such terms as import that he is the real and only principal². Where the agent does not disclose the name of the principal, there is a presumption that the agent can personally enforce the contracts entered into by him and that he is personally bound by them³. Where without disclosing the name of the Banailiraj its manager had some work done by the plaintiff, the manager was not personally liable as no credit was given to him⁴. When a plaintiff discloses a contract between the plaintiff and the agent of a disclosed principal, the agent cannot be sued⁵. Ordinarily speaking, the term *pacca arhtia* conveys the sense that the so-called agent is acting as a principal on behalf of the person for whom he buys or sells the commodities in question. The section, therefore, cannot apply to his case⁶.

The general rule is that if a person sells goods (supposing at the time of the contract that he is dealing with a principal) but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction but an agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not the principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor dealing with him and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal with liability⁷. A solicitor ordering a broker to sell stock acts as principal though the broker knows that the solicitor is acting for a broker⁸. Where a broker entering into a contract of sale in his own name discloses the name of the principal shortly afterwards, it amounts to a disclosure of the principal at the sale, he cannot, therefore, by paying the principal have any right against the buyer⁹. If secretaries of voluntary societies make contracts without disclosing the names of the persons under whose authority they are acting, they of course render themselves liable for the performance of the contracts they have made, though they may be indemnified by their principals¹⁰. Under a mutual assurance policy one member of an association who has suffered loss may sue the others on the policy, but not the undisclosed principal of a member, where the

2 *Collins v. Associated Race Courses*, (1930) 1 Ch 1, 32.

3 *Alagappa Corp. v. U. Brokers*, 1948 M 216.

4 *Gulzar v. Sheva*, 24 IC 415.

5 *Raghunath v. Kesori*, 150 IC 671; see S 233.

6 *B. C. Punjab Ld. v. B. K. Trading Co.*, 177 IC 985.

7 *Thomson v. Davenport*, 9 B & C 78, 86, fold in *Armstrong v. Stokes*, LR 7 QB 598.

8 *Hichens H. W. & Co. v. Jackson & Sons*, 1943 AC 266.

9 *Morris v. Cleasby*, 4 M & S 566.

10 *Bhojabhai v. Hayem*, 22 B 754.

principal is not a member of the association¹¹. In *Agacio v. Forbes*¹² it was held that one partner with whom personally a contract was made was entitled to sue upon it in his own name without joining his co-partners as plaintiffs. Such a contract shall be presumed to exist in, amongst other cases, a case "where the agent does not disclose the name of the principal"¹³. When a contract made by a person conveys to the other contracting party the notion that the agent is contracting in that character, he cannot sue or be sued on the contract. Where one contracting party knows that the other is contracting as an agent for a third person, the presumption laid down in clause (2) does not arise, for knowledge is equivalent to disclosure, even though the name of the principal has not been disclosed¹⁴. A secretary of a club cannot, unless he specially accepted a personal liability, be sued personally on a contract entered into on behalf of the members of the club¹⁵. A secretary cannot sue the members of a non-proprietary club for goods, the property of the club, supplied to the members¹⁶. A club is not a body corporate and has no existence in the eye of law and is incapable of contracting or entering into legal relations with other bodies. Merchants who deal with a club, which is not registered as a body public, do so at their own risk and the only persons they can hold liable for their debts are such officials of the club who have actually contracted with them or such members of the club as may be shown to have authorised or approved of the contracts. Creditors cannot by any device make those secretaries or managers who have not entered into contracts with them or ratified such contracts liable under the contracts¹⁷. Where agents sign as "agents for master and owners," they are not liable as principals on the charterparty agreement. The section is in accordance with English law¹⁸. When an agent has brought his principal face to face with the other contracting party, it cannot be said that he did not disclose the name of his principal, and in such a case no presumption would arise under this section. An agent will be entitled to sue where there is a contract allowing him to sue personally even if he has disclosed the name of the principal¹⁹. The sellers' right to resort to the undisclosed principals on a contract made by a broker in his own name is not affected by their delaying to do so until the purchaser from the purchasers became insolvent, the original purchasers (undisclosed principals) not having paid the brokers nor otherwise altered their position²⁰.

11 *United K. M. S. Association v. Nevill*, 19 QBD 110.

12 14 Moo PC 160.

13 *Gopal Das v. Badrinath*, 2 ALJ 3; see *Bungsee Singh v. Soodist Lal*, 7 C 739.

14 *Mackinnon Mackenzie & Co. v. Long Moir & Co.*, 5 B 584; *Soopromanian v. Heilgers*, 5 C 71 reld. to.

15 *N. W. P. Club v. Sadullah*, 20 A 497.

16 *Evans v. Hooper*, 1 QBD 45; *Gray v. Pearson*, LR 5 CP 568, reld. to in *Michael v. Briggs*, 14 M 362.

17 *Oldfield v. Co-operative Stores*, 88 IC 784; *T. N. Bank v. T. Union*, 1943 M 530.

18 *Hasonbhoy v. Clapham*, 7 B 51, 65.

19 *Deo v. Narayan*, 116 IC 669.

20 *Campbell v. Hicks*, 28 LJ Ex 70.

The presumption created by S. 230 (2) is merely a *prima facie* one, and may be rebutted by the language of the contract itself. The effect of S. 230 cl. (2) read with S. 92 is that if on the face of a written contract an agent appears to be personally liable, he cannot escape liability by evidence of any disclosure of his principal's name apart from the contract¹. The presumption is not rebutted by the agent merely writing the words "for principal" after his signature².

Managing members of a firm who enter into a contract in their own names on behalf of a joint family business are in the position of agents for undisclosed principals and can sue in their own names³. Where a person describes himself as an agent, the other party may show that he is in fact the principal and can sue him as such⁴. An agent executing hundi for loan is personally liable if he does not disclose the name of the principal⁵.

The contract of a broker, if he adheres strictly to his position as a broker, is one of employment between him and the person who employs him and not a contract of purchase or sale with the other party. A broker may, however, make himself a party to the contract of sale or purchase. If he acts as a mere negotiator to bring the parties together, he cannot sue or be sued⁶. Where a broker signs a contract as "sold by your order and for your account to my principals"⁷; or as "bought for you from my principals"⁸, the broker is not liable. A broker passing a note in these terms, "sold this day by order and for account of H to selves for principal." etc., enters into the contract expressly in the character of a broker or agent, therefore he is not entitled to sue upon the contract. Evidence of usage inconsistent with the terms of a contract is not admissible⁹. Charterers may contract as agents for undisclosed principals who may come in and take the benefit of the charter-party¹⁰. A broker buying in his own name has been held entitled to recover the value of goods bought, on behalf of a principal, from the vendor on his refusing to comply with the contract of sale, even though the principal subsequently repudiated the contract¹¹. The characteristic of a "principal contract" is that on the sold note the name of the seller appears, but in place of the name of the buyer the words "our principals" are inserted. In the like manner on the bought note the names of the buyers themselves appear and instead of the names of the sellers the words "our principals" are inserted. To principal contracts is attached a custom of the market as to liability for the performance of the contract resting upon the brokers and a right in them

1 *Soopromanian v. Heilgers*, 5 C 71.

2 *Gubboy v. Avetoom* 17 C 449.

3 *Gopal v. Badri*, 27 A 361.

4 *Carr v. Jackson*, 7 Ex 382.

5 *Trilok Chand v. Rameshwar Lall*, AIR 1975 Pat 196.

6 *Patiram v. Kankinara Co.*, 42 C 1050; *Gubboy v. Avetoom*, 17 C 449 not fold.

7 *Southwell v. Bowditch*, 1 CPD 374.

8 *Patiram v. Kankinara Co.*, 42 C 1050; *Jivraj v. Chainkaram*, 1944 N 279.

9 *Nanda v. Gurupada*, 51 C 588.

10 *Drughorn v. Rederiaktiebolaget*, 1919 AC 203; (1918-19) All ER Rep 1122.

11 *Short v. Spackman*, 2 B & Ad 962.

to enforce the contract. The section is no bar to such an action, for it starts by saying "in the absence of a contract to the contrary"¹².

A principal can sue upon a contract entered into by an agent whether the name of the principal is disclosed or not¹³; alternatively, the agent may sue for damages¹⁴. An undisclosed principal, whose existence is afterwards discovered, may be sued along with the ostensible principal, though it is not absolutely essential to do so¹⁵. An undisclosed principal may not only sue and be sued on any contract made on his behalf but he may sue for specific performance in equity unless the contract was based on the personal qualities of the agent or the relief would be inequitable in the circumstances of the case¹⁶. The name of the underwriter must appear in contracts of marine insurance under the statute in England¹⁷. Even when an agent for an unnamed principal is exonerated from personal liability under the contract, he can, on proof being given that he was his own principal, sue on the contract in his own name. An agent for an undisclosed principal is not precluded from saying that he is his own principal¹⁸.

5. Where the principal can be sued.—"Wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible to the person with whom he is dealing for or on account of his principal." If there is fraud, he would be answerable personally in an action¹⁹. An estate agent who contracts to sell land as principal is personally liable on the owners refusing to complete the purchase²⁰.

An agent coupled with an interest may sue in his own name¹. When an agreement is entered into for sufficient consideration, and either forms part of a security, or is given for the purpose of securing some benefit to the donee of the authority, it is an authority coupled with interest and is irrevocable. In such a case authority is given to a particular individual to do a particular thing, the doing of which confers a benefit upon him, the authority ceases when the benefit is reaped. The ordinary case of an agent or manager employed for pecuniary reward in the shape of a fixed salary is not an authority coupled with interest². Where an agent enters into a con-

12 *Jitmul v. Ram Gopal*, 50 C 12. *Joylal v. Monmotha*, 20 CWN 365 fold.

13 *Hood v. Barrington*, LR 6 Eq 218, 222.

14 *Allen v. O'Hearn*, 1937 AC 213.

15 *De Mautort v. Sounders*, 1 B & Ad 398.

16 *Harmer v. Armstrong*, 1934 Ch 65 : (1933) All ER Rep 778.

17 *M. U. Insee. v. M. V. G.*, (1933) 1 KB 812.

18 *Schmaltz v. Avery*, 16 QB 655, but see 235, 236.

19 *Lewis v. Nicholson*, 18 QB 503, Story, Agency S 264, cited.

20 *Long v. Millar*, 4 CPD 450 : (1874-80) All ER Rep 556.

1 *Krishnamacharlu v. Rangacharlu*, 16 M 73 : *Gray v. Pearson*, LR 5 CP 568 ; *Glasvott v. Gopal*, 1 WRCR 254, refd. to in *Subramania v. Narayanan*, 24 M 130. In *Williams v. Millington*, 1 H Bl 81 : (1775-1802) All ER Rep 124 ; *Robinson v. Rutter*, 24 LJQB 250 auctioneers were held to have contracted as agents having an interest and so entitled to sue in their own names.

2 *Frith v. Frith*, 1906 AC 254.

tract as such, if he has an interest in the contract he may sue in his own name. The mere fact that after a contract has been made between *A* and *B*, *A* gives *C* authority to act for him for a consideration does not create any privity between *C* and *B*, so as to enable *C* to sue *B* for breach of his contract with *A*. Authority to bring a suit does not necessarily give an agent the right to sue in his own name³. The position of an agent cannot be improved so as to give him the status of a principal by the mere fact of his being given extensive powers or being allowed to make contracts in his own name. Where an agent has a special property or a beneficial interest in the subject matter of the contract, he is entitled to enforce it though his representative character may have been declared at the time of the contract⁴.

No doubt an auctioneer is classified as an agent, but in his capacity as an auctioneer he has an interest in the goods entrusted to him for auction sale. The English and Indian laws are analogous on the point that where an agent has an interest in the contract he may sue on that contract in his own name. An auctioneer by virtue of his lien therefore can maintain an action in his own name for the price of goods sold⁵. In case of a sale without reserve, the highest *bona fide* bidder has a right of action against the auctioneer; if a bid be made by or on behalf of the owner the sale is not "without reserve" in such a case and the contract of the auctioneer is broken⁶. A factor who sells goods for a principal may bring an action in the name of the principal against the vendee⁷. So also an auctioneer may sell where he makes himself personally liable under the contract. The general rule is that when an agent makes a contract naming his principal, the contract is made with the principal and not with the agent. But even where the principal is known, a contract in writing may be made by an agent with a third person in such terms that he is personally bound to the fulfilment of it⁸. So also an auctioneer may be sued if he makes the contract of sale but the goods cannot be delivered because he has not given the necessary order⁹. Where an agent, *e.g.*, an auctioneer, has a lien, a payment to the principal does not prevent the agent from suing¹⁰. A person who directs another to pay money to a third person is entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him; but where the agent is directed or authorised by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf

3 *Subramania v. Narayanan*, 24 M 130; *Mallhu v. Meghraj*, 55 IC 992.

4 *Durga v. Cawnpore Flour Mills*, 123 IC 209.

5 *Kharas v. Bhawanji*, 92 IC 394.

6 *Warlow v. Harrison*, 1 E & E 309, 317: (1843-60) All ER Rep 620.

7 *Snee v. Prescott*, 1 Atk 248.

8 *Fisher v. Marsh*, 6 B & S 411, 416; *Dickenson v. Naul*, 4 B & Ad 638.

9 *Woolfe v. Horne*, 2 QBD 355; *Williams v. Millington*, 1 H Bl 81: (1775-82)

All ER Rep 124.

10 *Robinson v. Rutter*, 4 E & B 954, distgd. in *Grice v. Kenrick*, LR 5 QB 340 where the agent had no lien or claim against the principal; see *Manley v. Berkett*, (1912) 2 KB 329.

or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf¹¹.

Where fraud has been practised upon an agent inducing him to part with money belonging to the principal, either the principal or the agent may recover the money from the payee¹². Similarly, where money is paid by the agent by mistake to a wrong person the agent has got an interest to recall the money so that it may be paid to the right person¹³.

A company is not liable upon a contract entered into by promoters on its behalf before its formation, unless sanctioned by the Act constituting the company. A company cannot ratify such a contract because it was not then in existence. In such a case, namely, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, the contract would be altogether inoperative¹⁴. Thus, a company, on formation, may repudiate any payment that may have been promised to a promoter before the formation of the company. With regard to professional services rendered before the formation of the company, no action would lie for their recovery as the company was not in existence when the services had been performed¹⁵. No person can, as agent, bind by contract a principal who does not exist at the date of the contract¹⁶. The mere fact that a committee being an unregistered body cannot be sued cannot make the servants of the committee personally liable¹⁷.

According to the rules of English law, no person who is not a party to a deed can be sued upon the covenant contained in it. But this rule has not been followed by the High Court of Madras¹⁸.

Government is not liable for the acts of its agents done in the exercise of sovereign powers and not in the conduct of business undertakings or not ratified by the Government¹⁹. An action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be in the particular instance a breach of such employment²⁰. Superior officers are not responsible for the negligence or misconduct of inferior officers though the superior officers appointed them and had the power of dismissing them, because the duties to be performed by the inferior officers

11 *Siva v. Gnana*, 21 MLI 359, fold in *Venkata v. Narasimha*, 68 MLJ 159.

12 *Holt v. Ely*, 1 E & B 795.

13 *Colonial Bank v. Exchange Bank*, 11 AC 84, 91.

14 *Kelner v. Baxter*, LR 2 CP 174, 183; *Shrewsbury v. N. S. Ry.* LR 1 Eq 593, 615-16.

15 *Re. H. & S. W. W. E. Co.*, 2 Ch D 621.

16 *Lakshmishankar v. Motiram*, 6 Bom LR 1106.

17 *Raghar v. Firm P. L.*, 1933 L 93.

18 *Chinnaramanuja v. Padmanabha*, 19 M 471; *Ragoonathdas v. Morarji*, 16 B 574 not fold.

19 *Ram v. S. of S.*, 1932 A 575.

20 *Grant v. Secretary of State*, 2 CPD 445; *Palmer v. Hutchinson*, 6 AC 619; *Auty v. Hutchinson*, 17 LJCP 304; *Rowland v. Air Council*, 96 LJ Ch 470; *Rice v. Chute*, 1 East 579.

are imposed by law and not by the will of the party employing them¹. The distinction as to the extent to which the acts and declarations of a private agent bind his principal and those of public agents bind the Government is pointed out by Story, S. 307².

Art. 299 (1) of the Constitution provides that all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State as the case may be. A contract which is not so expressed shall be void and cannot be enforced against the Union or the State. Can it be enforced against the officer who acted on behalf of the Government in making the contract under sec. 230 (3) of the Contract Act? The answer was in the affirmative in *Chatturbhuj v. Nareshwar*³. The correctness of this decision was, however, doubted by Grover J. while delivering the judgment of the Supreme Court in *State of U. P. v. Murari Lal*⁴. The question in that case was whether an officer entering into a contract on behalf of the Government is liable under sec. 230 (3) if the contract becomes void by reason of non-compliance with the provisions of Art. 299 (1). His Lordship observed: "The consensus of opinion is that a contract entered into without complying with the conditions laid down in Art. 299 (1) is void. If there is no contract in the eye of the law it is difficult to see how sec. 230 (3) of the Contract Act would become applicable". The decree for damages passed against the officer concerned by the trial court and the High Court was set aside by the Supreme Court.

No doubt under the English law none but those whose signatures appear on a bill of exchange or a negotiable promissory note can be sued thereon. But no provision similar to S. 23 of the English Bills of Exchange Act, 1882, having been enacted here, the question has been raised whether, under Ss. 233 and 234, the principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name. A coparcener borrowing money on a promissory note may bind the other coparceners if the debt be incurred in connection with family affairs, not on the law of agency but under the Hindu Law⁵. But it has been held that in an action on a bill of exchange or promissory note against a person whose name properly appears as a party to the instrument it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal⁶. An agent, therefore, taking a loan and executing a promissory note in his own name, not as agent and not disclosing the name of the principal, is personally liable⁷. Even a signature by a person on a promissory note as "agent holding a power of attorney from the zamindar" has been held to give no indication

1 *Tobin v. The Queen*, 33 LJCP 199, 204.

2 Cited in *Secretary of State v. Kasturi*, 12 MLJ 453, 463.

3 AIR 1954 SC 236, 243.

4 AIR 1971 SC 2210.

5 *Krishna v. Krishnasami*, 23 M 597.

6 *Sadasuk v. Sir Kishan*, 29 CLJ 340, 347; see *Bakadas v. Tanabai*, 118 IC 673; *Subba v. Ramaswami*, 30 M 88; *Lallu v. Dy. Commissioner*, 165 IC 578.

7 *Jagmohan v. Sampatlal*, 135 IC 401.

that the maker signed as an agent or did not intend to incur personal liability⁸.

A ruler of an Indian State cannot be sued for work done for him without the consent of the Governor-General, but under sub-clause (3) his agent is liable to be sued where the consent of the Governor-General is not obtained⁹.

Where the principal intervenes and accepts payments from the other contracting party the agent's right to sue for the money comes to an end¹⁰.

231. Rights of parties to a contract made by agent not disclosed.—If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract ; but the other contracting party has, as against the principal, the same right as he would have had as against the agent if the agent had been the principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Contract by undisclosed agent.—Ss. 226, 227 and 228 lay down the law as to how far the principal is bound by the contract of the agent. S. 229 specifies the cases in which the principal will be held to be bound by any notice or information received by the agent. S. 230 describes how far the agent is entitled personally to enforce a contract made by him on behalf of his principal. This section deals with the rights (i) of the principal, and (ii) of the third party in cases where the contract is entered into by the agent without disclosing his principal, cases in which a presumption arises under S. 230 that the agent is personally able to enforce the contract. Under the first clause there is the general rule that the third party shall have, as against the undisclosed principal, the same rights which he would have had as against the agent, if the agent had been the principal. The second clause deals with a particular case where the principal discloses himself before the contract is completed. The second clause in effect restricts the principal's right to intervene. The third party "may refuse to fulfil the contract" upon proof that he would not have entered into it "if he had known that the agent was not a principal," provided that "the principal discloses himself before the contract is completed," i.e., this disclosure is not made by another person¹¹. The section gives the undisclosed principal the option to proceed against

⁸ *Koneti v. Jatu*, 25 MLJ 425.

⁹ *Abdul Ali v. Goldstein*, 4 IC 902.

¹⁰ *Rogers v. Hadley*, 2 H & C. 227 ; *Atkinson v. Cotesworth*, 3 B & C 647 ; *Sadler v. Leigh*, 4 Camp 195.

¹¹ *Lakshmandas v. Anna*, 32 B 356, *refing. to Grenon v. Lachmi Narain*, 24 C 8.

'the other contracting party', but if the plaintiff can bring his suit under S. 211, this section is no bar to such a suit. Where the other contracting party refuses to perform the contract on account of the failure of the agent of the undisclosed principal to pay the former his dues under the agent's own separate contract, the proper section for the principal to proceed is S. 231¹². Where a man sells goods as a principal, the purchaser will not be afterwards deprived of his right of set-off by the intervention of a third person. But if before the contract is completed the buyer is informed that the goods belong to a third person, he cannot set off a debt due to him from the agent¹³. "According to the English cases it has to be averred that the agent was allowed by the plaintiff to conduct himself as principal and that the defendant believed that he was the principal¹⁴. It is not necessary to aver that he had no means of knowing the real facts and no reason to suspect that the agent was an agent"¹⁵.

There is no absolute rule of law that one partner cannot sue for a debt due to the firm. (i) A partner with whom a contract has been personally made is entitled to sue upon the contract in his own name without joining the co-partners as plaintiffs, although the benefit of the contract would result to the partnership firm¹⁶. (ii) Where a partner as agent has an interest in the contract he can sue in his own name. (iii) A partner under S. 230, as agent for an undisclosed principal, can personally enforce the contract¹⁷.

Under the section a party (plaintiff) as the undisclosed principal can take advantage of a contract made by his agent, with a third party, subject to any rights which the third party may have against the agent¹⁸. Under the section the principal, even if not disclosed, is entitled to sue for the loss of a consignment in transit although the receipt was granted in the name of his agent¹⁹. The position of an agent who has entered into a contract for an undisclosed principal, and has the property conveyed to him in pursuance of the contract, approaches that of a *benamidar*²⁰. Pothier in his treatise on *Obligations*¹ says: "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make an error with regard to the person destroys my consent and therefore annuls the contract.....On the contrary, when the consideration of the person with whom I thought I was contracting

12 *Makhan v. Bashudha*, 61 C 504.

13 *Moore v. Clemenston*, 2 Camp 22.

14 *Borries v. Imperial Ottoman Bank*, LR 9 CP 38.

15 C & S 540.

16 *Agacio v. Forbes*, 14 Moo PC 160; *Subrahmania v. Narayanan*, 24 M 130; *Coorla Mills v. Vallabhadas*, 27 Bom LR 1168, 1191; see *Gopal Das v. Badri Nath*, 2 ALJ 3, cited under S. 230.

17 *Kapurji v. Panaji*, 53 B 110.

18 *Jagannath v. Heap & Co.*, 2 IC 804.

19 *E. I. Ry. v. Baldeo*, 92 IC 1007.

20 See *Raja Venkata v. Goluguri*, 7 IC 60.

1 Cited in *Smith v. Wheatcroft*, 9 Ch D 223, 230: (1874-80) All ER Rep 693.

does not enter at all into the contract and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand".

232. Performance of contract with agent supposed to be principal.—Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to B, sells 1,000 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

Contract by undisclosed agent.—Both Ss. 231, first clause, and this section cover the same ground. They have, however, been thus distinguished. S. 231 provides, with reference to the assertion of rights by and against the undisclosed principal (i) that the principal of the agent making the contract may require performance of the contract from the other contracting party, and (ii) that the other contracting party has, against the principal, the same rights as he would have had against the agent if the agent had been the principal. The "principal" in the section is the principal of the agent. The section, so construed, makes the right of the principal to require the performance subject to the rights and obligations existing between the agent and the other contracting party, it thus qualifies the unlimited right of the principal given by the first portion of S. 231. This section is not a repetition of the first paragraph of S. 231. It is a qualification of the first portion of that paragraph which gives a principal a general right to enforce a contract entered into by his agent. S. 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party. S. 233 makes either the agent or the principal, or both, liable to the agent's contract where the agent is personally liable. S. 234 imposes a further qualification upon the rights given to the other contracting party by the second portion of the first paragraph of S. 231. It will be seen that the Act has by this section adopted, as regards the principal, the qualification imposed on him by English law, namely, that he must take the contract subject to all equities in the same way as if the agent were the real principal; but that in the converse case of the "other contracting party" it has not imposed upon him the qualification laid down by the cases of *Thomson v. Davenport*², and *Armstrong v. Stokes*³, namely, that the other

² 9 B & C 78, 2 Sm LC 336.

³ LR 7 QB 598.

contracting party's right to hold the principal liable is subject to qualification that the principal has not paid the agent, or that the state of the accounts between the principal and the agent has not been altered to the prejudice of the principal⁴. In *Heald v. Kenworthy*⁵, the qualification laid down in the above two English authorities has been limited to cases in which the seller by some conduct has misled the buyer into believing that a settlement has been made with the agent. Therefore, "If a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment unless the agent pays it accordingly."

Contract with agent supposed to be principal.—"The principal's right to enforce contracts made by his agent is subject to this rule, namely, that if the agent has been allowed to deal in his own name, the party dealing with him will enjoy the same rights against the employer as he might have exercised against his agent had that agent really been a principal. Thus, when a factor dealing for a principal, but concealing that principal, delivers goods in his name, the person contracting with him has a right to consider him to all intents and purposes the principal and, though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal"⁶. Whenever a contract is made, if one of the contracting parties has a real principal behind him, that real principal may intervene and take the benefit of the contract and sue upon it, subject to any right of set-off there may be against the agent⁷.

If a man sells goods acting as a broker, he is *functus officio* and the terms of the contract cannot then be altered except by the authority of the principal. But a broker with an undisclosed principal may vary the terms of payment after the sale is completed. The principal may interfere at any time before payment, but not to rescind what has been done before⁸. If by special request or by mere standing by a party has been induced to deal with the agent as principal he is entitled to all the equities he would have been entitled to as against the agent⁹. The general rule of law is that "where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal and consequently he is to have the same right of set-off which he would have had against the agent"¹⁰. The rule is most frequently acted upon in cases of sales by factors, agents, or partners,

⁴ *Premji v. Madhowji*, 4 B 447.

⁵ 24 LJ Ex 76. fold in *Irvine & Co. v. Watson*, 5 QBD 414 (1874-80) All ER Rep 1007.

⁶ *Smith's Mercantile Law*, 5th Ed 163.

⁷ *Spurr v. Cass*, LR 5 QB 656.

⁸ *Blackburn v. Scholes*, 2 Camp 341.

⁹ *Ferrand v. Bischoffsheim*, 4 CBNS 710, 716.

¹⁰ *Dresser v. Norwood*, 14 CBNS 574, 588.

in which case either the nominal or the real contractor may sue; it may be equally applied to other cases, e.g., where a person lends money nominally on his own account but really on account of another, the real lender may sue for the money¹¹. The law with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt is well established by *George v. Clagett*¹². Where the factor sells in his own name to a third person who buys without notice that he is dealing with an agent, the latter has ordinarily a right to be put in the same position as if the factor was the real principal in the transaction and may set up against the concealed principal in the transaction any defence which he may have against the factor. That rule is founded on principles of common honesty. One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of its afterwards turning out that there was a concealed principal¹³.

If a factor sells goods as owner and the buyer *bona fide* purchases them in the belief that he is dealing with the owner, the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has long been settled¹⁴. "The principle is not confined to the goods. If *A* employs *B* as his agent to make any contract for him, or to receive money for him, and *B* makes a contract with *C* or employs *C* as his agent, if *B* is a person who would be reasonably supposed to be acting as a principal and is not known or suspected by *C*, to be acting as an agent for anyone, *A* cannot make a demand against *C* without the latter being entitled to stand in the same position as if *B* had in fact been a principal. If *A* has allowed his agent *B* to appear in the character of a principal he must take the consequences"¹⁵. This right of set-off is really based on the principle of estoppel¹⁶, and operates only in case of liquidated debts in English law¹⁷.

In English law it is enough if the other contracting party believed the agent to be the principal and did not know that there was a principal behind the agent and that the agent sold the goods in his own name and as his own goods. In order to make a valid defence within the rule in *George v. Clagett*¹⁸, it is quite unnecessary to go on and aver that he had no notice or means of knowledge¹⁹. In order that a buyer may set off a debt due from the agent when sued by the principal, it must be shown that he sold the

11 *Sims v. Bond*, 5 B & Ad 389; *Sadler v. Leigh*, 4 Camp 195.

12 7 TR 359.

13 *Turner v. Thomas*, LR 6 CP 610, 613. This rule does not apply where the person dealing with the agent knows him to be an agent; *Maspons v. Mildred*, 9 QBD 530; *Kaltenbach v. Lewis*, 10 AC 617; *Semenza v. Brinsley*, 34 LJCP 161.

14 *Rabone v. Williams*, 7 TR 360 n; *Fish v. Kempton*, 7 CB 691; *Carr v. Hinchiff*, 4 B & C 547; *Re Henley*, 4 Ch D 133 : (1874-80) All ER Rep 1004.

15 *Montagu v. Forwood*, (1893) 2 QB 350, 355.

16 *Cooke v. Eshelby*, 12 AC 271 : (1886-90) All ER Rep 791.

17 *Turner v. Thomas*, LR 6 CP.

18 7 TR 359.

19 *Borries v. Imperial Ottoman Bank*, LR 9 CP 38.

goods as his own, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account and not for an undisclosed principal; and it must also be shown that the agent was enabled to appear as the real contracting party by the conduct or by the authority, express or implied, of the principal. It is not enough to show that the agent sold in his own name²⁰. Parol evidence is admissible to show that a party to a contract is in fact the plaintiff's agent, therefore, the plaintiff is entitled to enforce the contract. It is also equally well settled that where a contract is made with an agent in his own name for an undisclosed principal either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party¹.

233. Right of person dealing with agent personally liable.—In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

The section.—The section deals with the class of cases referred to in S. 230(2), namely, undisclosed principals. It enacts substantive law laying down who shall be held liable, and adjective law defining the procedure by which the liability may be enforced. The section follows the decision in *Calder v. Dobell*². The section appears to give the party dealing with an agent, who is personally liable, a double form of election. He can choose between suing both principal and agent jointly or electing to sue one of them. So that, in any case, if he sued one to judgment a suit against the other would be barred. But if he sued them both and one consented to judgment that would not be a bar to his continuing the suit against the other³. The opinion of the Calcutta High Court was divided on the point whether a cause of action against an agent and an undisclosed principal was joint and several, i.e., whether a decree against the one was a bar to a subsequent decree against the other⁴. The right of election exists even though the creditor was not aware of the existence of a principal whom he could hold liable when he

20 *Cooke v. Eshelby*, 12 AC 271 : (1886-90) All ER Rep 791.

1 *Ladhomal v. Chandumal*, 130 IC 548.

2 LR 6 CP 486; see *Robinson v. Read*, 9 B & C 449; *The Huntsman*, 1894 P 214.

3 *Dick v. Dhunji*, 25 B 378, *Morel Bros. v. Westmorland*, 1904 AC 11 : (1900-03) All ER Rep 397; *refd to*; *Moore v. Flanagan*, (1920) 1 KB 919 : 1920 All ER Rep 234. See *Raghunath v. Kesori*, 150 IC 671 cited under S. 230 n. 4.

4 *Morelle v. Martin & Co.*, 62 C 612.

sued the agent⁵. Thus, where a creditor sued the agent and not realising the whole of his claim sued the principal, the plaintiff having elected to hold the agent responsible upon the contract, and having obtained judgment and decree against him, could not afterwards maintain a suit against the principal in respect of the same subject matter⁶. Even if the decree be obtained erroneously against the agent, the principal cannot be proceeded against⁷. The first rule is that where *A* contracts with *B* without stating himself to be an agent, *B* may, on discovering his principal, elect between them. The second rule is the same where he states himself to be an agent, but does not name his principal, and even where *A* names his principal if the seller does not, at the time of making the contract, trust the agent exclusively. The third rule covers the case where *A* states himself to be an agent but has no principal, then he is personally liable. These rules set out in Smith's *Leading Cases*⁸ have been concisely summarised in the section. In *Paterson v. Gandasequi*⁹, the principal in the presence of his agent inspected the articles and selected such of them as he required, but it was the agent who afterwards ordered the goods. The sellers gave credit to him, made the invoices in his name and sent them to him, *held*, the seller has elected to treat the agent as his sole debtor and thereby precluded himself from recovering over against the principal¹⁰. A contract in writing by an agent signed by himself will bind his principal when the other contracting party discovers that he is the principal, although the contract is made without his information. That is the case of a bill of lading, signed by the master of the vessel, where the action is brought against the owners. It is possible, however, that an agent meaning to contract in his own name may be the party to sue on such a contract. An agent may say to the person with whom he is dealing, "I am the person responsible in this particular transaction," or the other party may say, "I hold you responsible to me, though I know your principal". An agent who contracts in his own name does not cease to be contractually liable because it is proved that the other party knew when the contract was made that he was acting as agent¹¹.

"It is well-established law that a person who has made a contract with an agent may, if and when he pleases, look directly to the principal, unless by the terms of the contract he has agreed not to do so; and that, whether he was or was not aware when he made the contract, the person with whom he was dealing was an agent only." A loan to a liquidator for the purpose of winding up, where the liquidator has power to borrow, is a loan

5 *Shivlal v. Birdichand*, 19 Bom LR 317; *Kendall v. Hamilton*, 4 AC 504, 515: (1874-80) All ER Rep 932.

6 *Bir Bhadar v. Sarju Prasad*, 9 A 681; *Somasundaram v. Subramaniam*, 99 IC 742.

7 *Mangali v. Rakhpat*, 25 IC 132.

8 11 Ed Vol 2 p 391.

9 15 East 62.

10 *Satya v. Gobinda*, 14 CWN 414. Banker can hold agent as well as the principal liable for money borrowed by the agent on a promissory note for the benefit of the principal.

11 *Beckham v. Drake*, 11 LJ Ex 201: 152 ER 35; *Abdul v. Gladys*, 54 CWN 770 PC.

to the company, though the liquidator has made himself personally liable¹². Similarly, where a secretary, treasurer and agent of a company, having power to borrow, borrows on his personal liability, the company is liable for the loan¹³.

An agent may make a contract by which he may become personally liable, while he still makes it on behalf of his principal, so that the other party has a choice to go against either the one or the other; i.e., that the contract may be such as to make the principal as well as the agent himself a party to the contract. But if the principal be made a party to the contract, he must be both able to sue and liable to be sued¹⁴. The fact that the creditor applies to the agent for payment does not make the agent the creditor's debtor and does not preclude the creditor from suing the principal debtor¹⁵. Where a creditor sues both the agent and the principal judgment cannot be given against both of them. As has been pointed out in *Morel Bros. v. Westmorland*¹⁶, the liability of principal and agent is not joint but alternative and that rule has been adopted in this section. The wording of the section is unfortunate. It can only be construed as meaning that a creditor may sue both principal and agent in the alternative and that he cannot get judgment against both of them jointly for the amount sued for. The liability of an agent and principal cannot be joint¹⁷. "There can be no doubt that in the absence of any alteration of the account to the prejudice of the principals, the plaintiffs on discovering that Boulton was merely an agent for the defendants, had a right within a reasonable time¹⁸ to elect to proceed against the defendants¹⁹ unless, in the meantime, with full knowledge as to who were the principals and with the power choosing between them and the agent²⁰, they had distinctly and unquestionably elected to treat the agent alone as their debtor. Principals and the agent were equally liable upon the contract, and the vendor had a clear option as to which of them he would hold responsible.....In general, the question of election can only be properly dealt with as a question of fact.....Judgment against the agent, as has been observed in *Priestley v. Fernie*², even without satisfaction, would constitute a conclusive election, yet no legal proceeding short of judgment would have that effect"³. Where, however, the creditor's suit against the agent is dismissed and there is no judgment against the agent on the debt, a suit will be against the principal⁴.

12 *Re Ganges steam Tug Co.*, 18 C 31 36; *Calder v. Dobell*, LR 6 CP 486 refd to.

13 *Purmanundas v. Cormack*, 6 B 326, see English authorities refd to.

14 *Elbinger v. Claye*, LR 8 QB 313, 318; *I. Ry. v. N. P. Commission*, 1941 PC 114.

15 *Macfarlane v. Giannacopulo*, 28 LJ Ex 72.

16 1904 AC 11.

Muhammad v. Shaw Wallance, 184 IC 153.

17 *Kuttikrishnan v. Appa*, 49 M 900, per contra *Lachman v. Bhagirath*, 90 IC 487;

18 *Smethurst v. Mitchell*, 28 LJ QB 241.

19 *Thomson v. Davenport*, 9 B & C 78, 86.

20 *Addison v. Gandasequi*, 4 Taunt 574; *Paterson v. Gandasequi*, 15 East 62.

1 *Calder v. Dobell*, LR 6 CP 486.

2 34 LJ Ex 172; *Kendall v. Hamilton*, 4 AC 504; (1874-80) All ER Rep 932.

3 *Curtis v. Williamson*, LR 10 QB 57.

4 *Raman v. Varavan*, 7 M 392.

If a seller of goods knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elects to give credit to such agent, he cannot afterwards recover the value against the known principal; but if the principal be not known at the time of the purchase made by the agent, when discovered, the principal or the agent may be sued, at the election of the seller; unless by the usage of trade, the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad⁵. If the principal has been misled by the other party (the creditor) into supposing that he (the creditor) has given exclusive credit to the agent and the principal has been prejudiced in consequence, the principal will be discharged from his liability. Mere delay in enforcing payment from the agent will not be sufficient for the purpose, unless the delay amounts to misrepresentation⁶.

A vendor selling to the agent of an undisclosed principal must elect to sue the principal within a reasonable time after he discovers him. Nine months cannot be considered within the limits of such reasonable time. There is another most important criterion to be taken into consideration, viz., that the vendor may not sue the undisclosed principal if the position of the latter towards his agent has been altered before the action is brought⁷. If a broker enters into a contract in his own name and has a principal, those whom he contracts with will have the responsibility both of the principal and the agent. Election, *e.g.*, to proceed against the agent only must be a matter of fact. Where a contract is reduced to writing parol evidence is admissible to show that the person was contracting for a principal. Election being once determined there is an end of the matter, *e.g.*, where an agent has been sued to judgment. When a man is acting as agent the principal is not less bound because the contract is so drawn as to make the agent also liable⁸. Receiving or taking bills in payment of the price from the agent does not amount to an election to treat him as a debtor so as to preclude the payee from having recourse to the principal⁹.

234. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.—When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

5 *Paterson v. Gandasequi*, 15 East 62.

6 *Davidson v. Donaldson*, 6 QBD 623.

7 *Smethurst v. Mitchell*, 1 E & E 622.

8 *Calder v. Dobell*, LR 6 CP 486.

9 *Robinson v. Read*, 9 B & C 449; *The Huntsman*, 1894 P 214, Bowstead, art 96.

1. **The section.**—This section lays down an exception to the general rule stated in the previous one. "In order to discharge a principal from liability for a debt contracted by his agent the principal must show that the creditor has himself misled him into supposing that he has elected to give exclusive credit to the agent, and that the principal has been prejudiced by that supposition. Mere delay in enforcing payment from the agent will not (in the absence of special circumstances) be sufficient for the purpose"¹⁰. "If the conduct of the seller (the person who has made a contract with an agent) would make it unjust for him to call upon the buyer (principal) for the money, as for example where the principal is induced by the conduct of the seller to pay his agent the money, on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal"¹¹. Where a buyer intimates to the seller's agent that he would hold the agent liable, he cannot afterwards hold the seller responsible¹².

235. Liability of pretended agent.—A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

1. **The section.**—In *Collen v. Wright*¹³, the rule has been thus stated : "A person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue." Also the rule has been stated in these words, "if a man makes a contract as agent he does promise that he is what he represents himself to be, and he must answer for any damage which directly results from confidence being given to the representation"¹⁴.

The section embodies the rule in *Collen v. Wright*. To render the agent liable under the section it is only necessary that the representation should have been untrue in fact and it is not necessary to show that the agent was in any way to blame. Nor does it make any difference that the agent was the agent of both parties. The liability of the agent arises, as pointed out

¹⁰ *Davidson v. Donaldson*, 9 QBD 623, headnote.

¹¹ *Heald v. Kenworthy*, 24 LJ Ex 76, fold in *Prenji v. Madhouji*, 4 B 447, see cases cited in previous section, note.

¹² *Mahadev v. Gouri*, 1950 Ori 42.

¹³ 7 E & B 301, 313, on app 8 E & B 657, reld to in *Hasonbhoy v. Clapham*, 7 B 51, 66, in *Re National Coffee Palace Co.*, 24 Ch D 367; *British R. Gazette v. A. N. Ltd.*, (1933) 2 KB 641; 1933 All ER Rep 320; see *Oliver v. Bank of England*, (1902) 1 Ch 610.

¹⁴ *Starkey v. Bank of England*, 1903 AC 114, 116.

in *Yonge v. Toynbee*¹⁵, from an implied undertaking or promise made by him that the authority which he professes to have does not in fact exist. That implied undertaking cannot be displaced except by words which amount to a distinct intimation that the agreement made was meant in certain circumstances not to be effectual. The section imposes on the agent the duty of making compensation for any loss or damage which the other party has incurred by so dealing with him¹⁶, the representation may not be fraudulent, all that is required is that it is untrue¹⁷.

2. Liability of pretended agent.—"The right of action, for which this section, founded on English cases, provides, assumes (i) that the defendant untruly represented himself as the authorised agent of a named person, or represented himself as having an authority larger than or different from that actually conferred on him, (ii) that the plaintiff was by such representation induced to deal with him as agent of the same person, (iii) that the person named repudiated the defendant's act, and (iv) that loss was in consequence occasioned to the plaintiff. When the supposed principal is not named, the section does not apply. Nor does it apply when a contract binding on the person named is established"¹⁸. In the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent is personally responsible as in *Polhill v. Waller*¹⁹. Then, where an agent has no authority and knows it, but nevertheless makes the contract, as having such authority, he is personally liable, for he induces the other party to enter into the contract on what amounts to a misrepresentation of fact peculiarly within his own knowledge. Lastly, where a party making a contract as an agent *bona fide* believes that such authority is vested in him, but has in fact, no such authority, e.g., on death of the principal, he is still personally liable. In all these cases there is some wrong or omission of right on the part of the agent which makes him personally liable, though the contract is made in the name of the principal²⁰.

There is no distinction in principle between the case of a man who represents that he has an authority from another when he has no authority whatever, and the case of a man who represents that he has certain authority from another when he has authority of another description. In neither case can the man who makes the representation be said to be the authorised agent of the other with reference to the matter regarding which he has no authority. The section has been applied to both classes of cases in England¹. The rule in *Gollen v. Wright*² is not confined to the case where the transaction is simply one of contract, but extends to every transaction of business into

15 (1910) 1 KB 215.

16 *Ismail v. Short*, 8 IC 291.

17 *Kishori v. Secretary of State*, (1938) 1 Cal 463.

18 C & S 544.

19 3 B & Ad 114.

20 *Smout v. Ilbrey*, 12 LJ Ex 357.

1 *Ganpat v. Sarju*, 34 A 168.

2 7 E & B 301, 8 E & B 607.

which a party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person. It is utterly immaterial for the application of this branch of the law whether the supposed agent knew of the defect of his authority or not³. Where a Muhammadan, who is not the authorised agent of his father, mortgages his father's land and holds himself out as an agent, this section and not S. 230 applies⁴. The pretended agent cannot be sued as a principal but is liable to damages for false representation of authority⁵.

In *Firbank's Executors v. Humphreys*⁶, it has been laid down that an agent impliedly warrants his authority and is liable to be sued on his warranty. Where the guardian of an infant was sued on the ground that she had represented to the lender that she had authority to incur the debt on behalf of the minor, *held* that as an infant could not appoint an agent, any representation that the guardian was her infant son's duly authorised agent was incorrect, for the moneylender knew the son to be an infant. Even if it be conceded that there was a representation as to her power to bind the estate, it was one on a point of law, and on the authority of *Beattie v. Ebury*⁷, it was incapable of supporting a suit⁸. A party dealing with an agent can make the agent liable if the principal repudiates the act of the agent⁹.

In order to maintain an action for breach of warranty of authority there must be misrepresentation in fact (not on a point of law) and trusted by the person to whom it was made and not a mere disclaimer of his authority by his agent¹⁰. The principle of *Collen v. Wright*¹¹ extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true¹². Speaking generally, an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well-established exception, namely, where an agent assumes an authority which he does not possess and induces another to deal with him upon the faith that he has the authority which he assumes. The damages in this case are arrived at by considering the difference in the position the contractor would have been in had the representation been

3 *Starkey v. Bank of England*, 1903 AC 114; see *Cherry v. Colonial Bank*, LR 3 PC 24.

4 *Mayaram v. Muhammad*, 151 IC 58.

5 *Lewis v. Nicholson*, 21 LJQB 311; 118 ER 190.

6 18 QBD 54.

7 LR 7 Ch 777, LR 7 HL 102, *referred to in Weeks v. Propert*, LR 8 CP 427.

8 *Shet Manibhai v. Rupaliha*, 24 B 166; *Maida v. Kishan*, 1934 A 64.

9 *Rattan v. Hafizullah*, 72 IC 1011.

10 *Halbot v. Lens*, (1901) 1 Ch 345; *Rashdall v. Ford*, LR 2 Eq 750.

11 7 E & B 301, 8 E & B 647.

12 *Weeks v. Propert*, LR 8 CP 427; *Dickson v. Reuter's Telegram Co.*, 3 CPD 1 *referred to*.

true, and the position he was actually in, in consequence of its being untrue¹³. An agent who has no authority, and who nevertheless represents that he is authorised to act as agent, cannot on that account be made personally liable on the contract, though he is answerable to those who were deceived by him for the breach of an implied warranty of authority¹⁴. Where there is a matter of doubt as to the liability of the agent or the principal under a contract, the usual course is to sue both, alleging that the principal was the principal to the contract and in the alternative suing the agent for breach of warranty of authority¹⁵.

3. **Measure of damages.**—If a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him and the contract becomes void for want of such authority, he is liable upon an implied warranty in damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not. The warranty which the law implies depends on the position of the parties and on the nature and effect of the representation. Thus, directors instructing a bank to honour the cheques of their general manager impliedly warrant that they have authority to authorise such cheques to be drawn and are liable on an implied warranty of authority where the authority is lacking¹⁶.

With regard to the measure of damages in such cases "the general principle is that he who has broken a contract is to make good to the plaintiff all the damage which is the direct consequence, in the ordinary course of affairs, of the breach of contract¹⁷. Where an agent misrepresents a fact to his own principal, he is guilty of a breach of duty to the principal, in giving him incorrect information and is liable in damages for such a breach of duty. He does not thereby make himself the agent of the other party within the meaning of the doctrine of *Collen v. Wright*¹⁸. Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that the agent's act has not been authorised, or ratified, or adopted by the principal, then although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the position as if the money had originally been borrowed by the principal¹⁹. This law applies to the case of a joint stock company when the borrowing powers of the company itself is

13 *Firbank's Executors v. Humyhreys*, 18 QBD 54.

14 *Coventry's Case*, (1891) 1 Ch 202, 211.

15 *Raghunath v. Kesori*, 150 IC 671; *Honduras Ry. v. Tucker*, 2 Ex D 301, fold in *Bennetts v. Mc. Illwraith*, (1896) 2 QB 464.

16 *Cherry v. Colonial Bank*, LR 3 PQ 24, refd to in *Beattie v. Ebury*, LR 7 HL 102; *Oxenham v. Smythe*, 31 LJ Ex 110.

17 *Simons v. Patchett*, 7 E & B 575.

18 7 E & B 301, 8 E & B 647; *Salvesen & Co. v. Reberi*, 1905 AC 302; (1904-07) All ER Rep 886.

19 *Bannatyne v. Mac. Iver*, (1906) 1 KB 103; (1904-07) All ER Rep 425; *Pannalal v. Nihal Chand*, 43 MLJ 66 PC; *West London Bank v. Kitson*, 13 QBD 360.

unlimited²⁰. Where the implied authority of an agent to borrow is not established, the creditor is entitled to a decree against the principal for such portion of the sums borrowed, though in excess of authority, as may have been actually spent by the agent for the benefit of the principal's business¹. The doctrine does not in any way conflict with the fundamental rule that a person dealing with an agent must at his peril ascertain the extent of the agent's authority². The doctrine is based upon the principle that for a principal to accept the proceeds of a loan made in his behalf by the agent acting without authority is a ratification of the unauthorised contract and therefore makes him liable for the sum received³, but the principal cannot be held liable where the act of the agent is not done in the ordinary course of his business or falls outside the apparent scope of his authority⁴. If a corporation which has no power to borrow, or has exhausted the power of borrowing, does, nevertheless, borrow, then such borrowing being *ultra vires* creates neither at law nor in equity any debt for money lent⁵. Where certain directors, who had no authority to do so, borrowed money on behalf of a society which had no power to borrow money, they were liable to the creditor in damages to repay the amount borrowed with interest⁶. Taxed costs of a suit, including the plaintiff's own costs may be recovered as part of damages for breach of warranty of authority⁷.

The measure of damages in an action for the breach of warranty of authority is always the same in every case. The measure is what the plaintiff has actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had the authority he professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made⁸. As to damages for breach of warranty of sale of a house, see *Godwin v. Francis*⁹. For breach of warranty of authority in the matter of purchase of shares, shares in a wrong company having been purchased by the agent and the transaction repudiated by the principal, the full value of the shares was allowed as damages, the shares being valueless at the time¹⁰. A person misrepresented may recover from an agent as part of damages the expenses incurred in a suit brought against the alleged principal for enforcing the contract entered

20 *Pratt v. Sassoon*, 60 B 326, see cases *refd.* to.

1 *Reid v. Rigby*, (1894) 2 QB 40 *refd.* to; *Paboodem v. Miller*, 1938 M 966.

2 *Heramba v. Kasi*, 1 CLJ 199; *Suppayya v. Dawood*, 32 IC 763; *Ghasiram v. Raja Mohan*, 6 CLJ 639.

3 *Ghasiram v. Raja Mohan*, 6 CLJ 639; *Re Wrexham &c. Ry.*, (1899) 1 Ch 440 *refd.* to.

4 *Dhanpat v. Allahabad Bank*, 98 IC 783.

5 *Reversion Fund v. Maison Cosway*, (1913) 1 KB 364; *Veerayya v. Venkata*, 1937 Mad. 66.

6 *Richardson v. Williamson*, LR 6 QB 276.

7 *Hughes v. Graeme*, 33 LJQB 335.

8 *Re National Coffee Palace*, 24 Ch D 367, cited in *Meek v. Wendt & Co.*, 21 QBD 126; *Kishori v. Secretary of State*, 42 CWN 116; see *Godwin v. Francis*, LR 5 CP 295 (sale of land).

9 LR 5 CP 295.

10 *Re National Coffee Palace*, 24 Ch D 367.

into by the agent without the authority of the principal¹¹.

The liabilities of public agents on contracts made by them in their public capacity are on a different footing from the liabilities of ordinary agents on their contracts. An agent of the Crown is not personally liable on any contract entered into by him on behalf of the Crown nor is the Crown agent personally liable on a contract warranting his authority as agent, in the absence of any express intention to the contrary¹².

236. Person falsely contracting as agent not entitled to performance.—A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

The section.—The section is meant to apply to cases where a person enters into a contract with another on the basis that the other person is acting as agent for somebody else¹³. The section is not restricted to cases when an agent purports to act for a named principal¹⁴. If a person purports to act as an agent for an undisclosed principal, and there is no undisclosed principal in fact, the section applies and he cannot sue on the contract. The section does not enact that the contract in such cases is void, it provides that the alleged agent cannot require its performance, *i.e.*, the contract is voidable. The English law however differs on this point¹⁵. The rule laid down in the section is wider than that of English law. Under that law the rule is confined to cases where the agent has named his principal. In such cases "the skill or solvency of the person who is named as principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal and sue in his own name¹⁶. But the reasoning and, therefore, the principle do not apply where the principal is not named; for in such cases the skill or solvency of the principal does not enter at all into the calculation of the other contracting party as a material ingredient"¹⁷. But the rule it seems is not definitely settled¹⁸.

The principle codified in the section is that an agent cannot recover if he really acts as principal. The section is not confined to cases where an agent purports to act for a named principal. In *Rothschild v. Brookman*¹⁹

11 *Spedding v. Nevell*, LR 4 CP 212.

12 *Dunn v. Macdonald*, (1897) 1 QB 555; (1895-99) All ER Rep 1125. Bowstead Art 124.

13 *Kota v. Nalam*, 42 IC 357, see cases reld. to.

14 *Sewdut v. Nahapiet*, 34 C 628.

15 *Ramdas v. Kondanmal*, 148 IC 372.

16 *Rayner v. Grote*, 15 M & W 359; *Fellowes v. Gwydyr*, 1 Russ & M 83.

17 *Schmaltz v. Avery*, 16 QB 655; 20 LJQB 228; *Harper & Co. v. Vigers* (1919) 2 KB 549.

18 *Sharman v. Brandt*, LR 6 QB 720, a decision which would go to support the rule as laid down in the section.

19 2 Dow & Cl 188, also *Robinson v. Mollett*, LR 7 HL 802; *Evans v. Hooper*, 1 QBD 45.

it has been held that a broker cannot, while purporting to act as agent for his employer, even if unnamed, really fill the position of the principal; a man cannot be in the same transaction a seller for his employer and a buyer for himself²⁰. Where a person purports to act as an agent for an undisclosed principal, who does not exist in fact, but really on his own account, he is prevented from suing on the contract by this section¹.

Although a principal may come in and take the benefit of a contract made by his agent, yet that doctrine cannot be applied where the agent contracts as principal. Thus, where a person describes himself as the "owner" of a ship in a charterparty, evidence is not admissible to show that he had contracted merely as the agent for another person². But the word "charter" does not mean "owner"³.

237. Liability of principal inducing belief that agent's unauthorized acts were authorized.—When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

Liability of agent for unauthorised acts.—The section is based on the doctrine of estoppel. If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented⁴. It is undoubted law that a person who deals with an agent, whose authority he knows to be limited, does so at his peril, in this sense that should the agent be found to have exceeded his authority

20 *Sewdutt v. Nahapiet*, 34 C 628; *Nanda v. Gurupada*, 51 C 588; *Sharman v. Brandt*, LR 6 QB 720. Brokers cannot enforce liability by pleading custom, for the custom being inconsistent with the contract, evidence of it is inadmissible.

1 *Ramji v. Janki*, 39 C 802; *Fairlie v. Fenton*, LR 5 Ex 169; *Fawkes v. Lamb*, 31 LJQB 98.

2 *Humble v. Hunter*, 12 QB 310: (1843-60) All ER Rep 468; see *Formby v. Formby*, 102 LT 116; *Rederi v. Hani*, (1918) 2 KB 247.

3 *Drughorn Ltd. v. Rederi*, 1919 AC 203: (1918-19) All ER Rep 1122.

4 *Carr v. L. & N. W. R.*, LR 10 CP 307: (1874-80) All ER Rep 418; *Kamini, v. Hari*, 1939 C 416.

his principal cannot be made responsible. Authorities from *Grant v. Norway*⁵ to *Ruben v. Great Fingall Consolidated*⁶ establish the proposition that in order that the principle of "holding out" should, in any given case of agency, apply, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts which the agent is holding out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been thereby misled. In other words, if the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, because the party prejudiced has notice and should ascertain whether or not the act is authorised⁷. Government cannot be held liable for improper acts of public servants unless those acts had been done under orders of Government or been subsequently ratified by it⁸. Government is liable for torts committed by servants in the conduct of undertakings which might be carried on by private individuals but not for acts done in the exercise of sovereign powers⁹.

If a person employs another as an agent in a character which involves a particular authority, he cannot, by a secret reservation, divest him of that authority. Thus, where the drawing and acceptance of bills of exchange were necessary as incidental to the carrying on of a business entrusted to an agent, he could not be divested of the apparent authority as agent against third persons by a secret reservation¹⁰. The reason, as has been stated, is that "it must be presumed that the apparent authority is the real authority"; if the agent could not "bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject matter," there would be no safety in mercantile transactions. Thus, where a commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe¹¹. An agent acting within the scope of his authority to enter into a contract, or being held out as having such authority, may enter into a binding contract on behalf of the principal¹². Where a principal sent an agent to settle a dispute, the plaintiff cannot repudiate the act of the agent on the ground that he had given the agent secret instructions not to settle for less than a certain amount¹³. Where the defendant so conducted himself and held another person out as to lead the plaintiff reasonably to suppose that the person was the general agent of the defendant to conduct his business, the defendant

5 10 CB 665.

6 1906 AC 439.

7 *Russo-Chinese Bank v. Liyan*, 14 CWN 381 PC (appeal from Hong Kong).

8 *Maharani v. Province*, 1944 FC 41.

9 *Radhakishen v. S. of S.*, 1932 S 181.

10 *Edmunds v. Bushell*, LR 1 QB 97; *Hawken v. Bourne*, 8 M & W 703.

11 *Pickering v. Busk*, 15 East 38, 43 : (1803-13) All ER Rep 657; see *Henderson v. Williams*, (1895) 1 QB 521.

12 *Pacific Minerals v. S. M. Syndicate*, 1938 C 343.

13 *Trickett v. Tomlinson*, 13 CBNS 663 : 143 ER 263; *Fuentes v. Montis*, LR 3 CP 268, 277.

would be bound by the acts of the agent. Thus, a master was held bound for goods obtained by his duly accredited agent from a tradesman who had no notice of the revocation of the agent's authority to act¹⁴. The proposition is well established that a person who puts his name on a blank paper stamped as a negotiable instrument incurs large responsibilities towards anyone who may make an advance on the faith of his signature¹⁵. "If a person is held out to third parties or to the public at large, by the principal, as having general authority to act for and to bind him in any particular business or employment, it would be the height of injustice and lead to the grossest fraud to allow him to set up his own secret, and private instructions to the agent limiting his authority, and defeat the facts and transactions under the agency when the party dealing with him had and could have no notice of such instructions. In such cases good faith requires that the principal should be held bound by the acts of the agent within the scope of his general authority"¹⁶.

A principal is bound by the acts of his agent acting within the scope of his authority and it is not open to the principal to say that the agent intended to misuse for his own ends the opportunity given to him by his authority. The person dealing with the agent is not bound to enquire whether the agent's motive did or did not involve the application of the authority for his own private ends¹⁷. So also where an agent has authority to borrow on exceptional terms under circumstances of emergency, it is not incumbent upon a lender to inquire whether in a particular case the emergency had arisen or not. If in good faith and without any notice of fact that the agent was not obeying the mandate of his employers a lender advanced money to him, the loan would be one by which the employers would be bound¹⁸. The liability of the principal arises by estoppel where the agent acts within the scope of his apparent authority but in excess of his actual authority¹⁹.

"Where an agent is clothed with an ostensible authority no private instructions can prevent his acts within the scope of his authority from binding the principal"²⁰. When an auctioneer sells certain properties at a price less than that at which he was instructed to sell by the owner thereof, and the purchaser buys it in ignorance of the said instructions, the owner is bound by the contract of sale entered into on his behalf by the auctioneer¹. When a broker, or other agent, entrusted with the possession and apparent ownership of money, pays it away in the ordinary course of his business for consideration, it is settled law that the transaction, though it may be fraudulent as between the agent and his employer, will bind the latter unless he can show

14 *Summers v. Solomon*, 26 LJQB 301.

15 *Lloyd's Bank v. Cooke*, (1907) 1 KB 794.

16 *R. S. Navigation Co. v. Bissessar*, 116 IC 148.

17 *Hambro v. Burnand*, (1904) 2 KB 10.

18 *Montaignac v. Shitta*, 15 AC 357, refd to in *Goolab v. Miller*, (1938) 2 MLJ 688; see *Bryant v. Quebec Bank*, 1893 AC 179.

19 *C & S* 548.

20 *National B. N. Co. v. Wilson*, 5 AC 176, 209.

1 *Derbari v. Sharif*, 121 IC 511, see illust. (a).

that the recipient knew that the payment was made by the agent in fraud of his employer². Where a charterparty provided that "in signing bills of lading the captain should only do so as the agent of the charterers", but he signed them in the usual way, the owners were held liable for nondelivery of goods to the holders of the bills of lading who had no notice of the provision in the charterparty³. Payment to a broker does not absolve the defendant from liability unless he can show either that the plaintiff gave authority to the broker to receive the money or that the plaintiff had so acted as to make the defendant believe that he had done so⁴. The general rule is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, he cannot acquire rights of ownership over it, even if full value be given, unless the person taking it can show that the true owner had so acted as to mislead him into the belief that the person dealing with the property had authority to do so. There is an exception to the general rule in the case of negotiable instruments. Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner had done nothing tending to mislead the person taking them⁵.

A clerk is held out to the world by a railway company as a person authorised on behalf of the company to accept consignments for despatch; and it is not open to the railway company to say that it is not bound by his act. As has been pointed out by Their Lordships of Privy Council in *Ram Pertab v. Marshall*⁶, the right of a third party against the principal on the contract of his agent, though made in excess of the agent's actual authority is nevertheless enforceable, where the evidence shows that the contracting party was led into an honest belief in the existence of the authority to the extent apparent to him⁷. This rule, therefore, has no application where the third party has no reason for supposing that the agent had authority to enter into a contract on behalf of the principal with reference to the transaction in question⁸. The mere possession of the title deed will not itself validate a security given by the person to whom the possession of the deed has been committed where there was no authority given him to use the deed as security. But where a person employs an agent to raise money on certain securities and at the same time directs him not to borrow more than a specified sum, but the agent obtains a loan in excess of the amount prescribed from a *bona fide* lender who has neither notice nor knowledge of the limitation, the principal must bear the consequences of his agent's fraud⁹. A principal is not

2 *Thomson v. Clydesdale Bank*, 1893 AC 282, 289 : (1891-94) All ER Rep 69.

3 *Manchester Trust v. Furness*, (1895) 2 QB 539; *Sandeman v. Scurr*, LR 2 QB 86; see *Frost v. Oliver*, 22 LJQB 353.

4 *Haribangsa v. Nalini*, 40 IC 799.

5 *London Joint Stock Bank v. Simmons*, 1892 AC 201, 215 : (1891-94) All ER Rep 415.

6 26 C 701.

7 *Fazal v. E. I. Ry.*, 43 A 623, 635; *Bissessar v. Kabul*, 1945 N 121; but see *Motilal v. B. P. T. Ry.* 1939 A 649.

8 *Karala V. T. Co. v. Lachmi*, 180 IC 141.

9 *Brocklesby v. Temperance B. Society*, 1895 AC 173; *Rimmer v. Webster*, (1902) 2 Ch 163; *Fry v. Smellie*, (1912) 3 KB 282; *Bowstead Arts* 80, 88.

bound by the act of an agent if a person dealing with the agent had knowledge of the agent's want of authority. Knowledge in such a case signifies "means of knowledge." A person cannot plead ignorance if he had the means of knowledge and, therefore, by using diligence could have obtained actual knowledge¹⁰. The principal is liable to a third person for the acts and omissions of his agent in the course of his employment, although the principal did not authorise or participate in the act or omission or even if he forbade it¹¹. Where contrary to the instructions of the principals the agent sold certain shares below the price fixed by them, but immediately on discovery of the mistake repurchased the shares and held them for the principals, *held*, although the agent by selling contrary to the instructions of the principals was bound to make good to them any loss sustained in consequence of his so acting, as no loss was sustained by the principals in fact in consequence of the agent's mistake, no suit for damages by the principals would lie. The law of principal and agent cannot be considered to be confined by the exact sections of the Act; in considering the liabilities and rights of an agent the court must look to the exigencies of business life and the situations that occasionally arise¹².

The word 'agent' does not of itself imply full authority to bind the principal. Ss. 186 and 187 show that the authority of an agent is to be gathered from either 'words' or 'circumstances' and is not implied in the mere fact that he is an agent. A principal who has no knowledge or means of knowledge that the money received by his agent has been misappropriated by the agent will not be bound to repay the amount to the person from whom it has been misappropriated¹³. Where a person, although an agent for another, signed a contract in his own name and described himself throughout as a principal, in an action against the real principal parol evidence to show that the person was agent only is inadmissible as such evidence will have the effect of contradicting the written contract. The omission on the part of an agent to describe himself as acting on behalf of a principal is immaterial. The question whether an agent is to be taken to have contracted personally or on behalf of his principal depends on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances¹⁴. Where the question was whether a customer had agreed to pay compound interest with monthly rests on overdrafts from a bank, *held*, from circumstances, *e.g.*, of entries in the pass book, of enquiries made and explanations demanded, it may be contended that means of knowledge was equivalent to knowledge, so as to fix the customer with adoption or ratification of the rate of interest that was being charged; and from continued and persistent acquiescence of this character the existence of an agreement might be presumed¹⁵. If there have been a regular course of business in which

10 *Jacobs v. Morris*, (1902) 1 Ch 816. 830-1, *referred to in Morarji v. Mulji*, 48 B 20.

11 *Mc. Gowan & Co. v. Dyer*, LR 8 QB 141; *Watkin v. Lamb*, 85 LT 483.

12 *Allahbad Bank v. Sheo Bakhsh*, 97 IC 888.

13 *Morarji v. Mulji*, 48 B 20, see cases *referred to*.

14 *Jagrup v. Ram*, 59 IC 596.

15 *Bata Krishna v. Bhawanipur Banking Corpn.*, 59 C 662.

the act of the agent has been acted upon as the act of the principal there would arise a presumption of the continuance of such authority. But where the act of the agent is wholly unauthorised and any adoption or ratification of the acceptance be negatived, so that there has been no course of business and nothing else to show any continuance of authority, or representation of continued authority, no presumption of continuance of authority can arise¹⁶. A distinction is drawn where agents, e.g., the directors of a company, have no power to enter into a transaction at all and those in which they have power to enter, provided certain conditions are complied with; in other words, between acts which, as regards the company, are altogether *ultra vires* and those which are *intra vires* but irregular; companies are not bound by the acts of the former but may be bound by acts of the latter class in favour of all persons dealing with the directors *bona fide* and without notice of the irregularities of which they may be guilty. Outsiders are expected to know what is called the "external position of the company," but are not bound to know its "indoor management"¹⁷.

Illustrations.—In connection with the illustrations it should be noted that the section has no application unless the person handing over the goods or negotiable instruments is a principal and the person who receives them is an agent. The section in terms speaks of a person dealing with third persons as the agent of the principal sought to be made liable. A custodian of goods for safe custody is a bailee of the goods and is not an agent of the true owner for the purposes of dealing with the goods. Illust. (b) does not, therefore, apply to the case of a wife handing over certain share certificates to the husband with a transfer signed in blank by the wife and the husband depositing them with a bank as security for an overdraft. The bank obtains no title to them¹⁸.

238. Effect, on agreement, of misrepresentation or fraud by agent.—Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations

(a) A being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

¹⁶ *Morris v. Bethell*, LR 5 CP 47.

¹⁷ *Abdul v. Mufassal Bank*, 24 ALJ 593.

¹⁸ *Benares Bank v. Prem*, 35 ALR 150.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

Liability of principal for fraud of agent.—The question is not whether authority to do the particular act should be implied from the nature of business or other circumstances, but whether the employer, whom it is sought to charge, has by his words or conduct held out the agent as a person authorised by him to do that particular thing, and so led the third person to believe that the authority was given. In point of fact, however, it is not always easy to say to which principle cases should be referred. In order to make the principal liable in damages, it must be proved that the statement complained of was known to be false, or at least made recklessly without any belief in the matter, and that it was made by the agent in the course of his employment¹⁹.

The principle underlying the section has been thus laid down in the leading English case of *Barwick v. English Joint Stock Bank*²⁰: "The general rule is that the master is answerable for every wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity be proved." "It is true he (the master) has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." "If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in the pleading as the fraud of the person who is sought to be made answerable in the action." "With respect to the question whether a principal is answerable for the acts of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." But when the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong of the agent in such employment. The Secretary of State will not be liable for torts or acts of negligence committed by Government servants while performing acts done in the exercise of powers which are usually termed 'sovereign'.

It is undoubted law that if an agent in the course of his employment commits a fraud upon a third party, whereby damage ensues to the latter, he will be liable to the party wronged though his principal would be so likewise²¹. Where an agent employs a sub-agent, and the latter in the course of his employment is guilty of fraud or misrepresentation, and the agent, with knowledge of the fraud, derives a material benefit from it, the case becomes analogous to that of a principal who profits by the fraud of his agent, the principle

¹⁹ C & S 551.

²⁰ LR 2 Ex 259, fold in *Mackay v. Commercial Bank*, LR 5 PC 394, explained in *Sher Jan v. Alimuddi*, 23 CLJ 225.

²¹ *Rahimbux v. Secretary of State*, 173 IC 100.

²² *Henderson v. Lacon*, LR 5 Eq 249, *referred to*; *People's Bank v. Hargopal*, 1936 L 268.

being, that he who profits by the fraud of one who is acting by his authority adopts the act of the agent, and becomes responsible to the party who has been imposed upon and has sustained damage by reason of it. Where an agent has been guilty of no fraud in fact and has not authorised his co-agents (co-directors) to make fraudulent misrepresentations nor has adopted them, he is not liable for such misrepresentations of others³. Where the agent is not authorised to do an act which is fraudulent and which is outside the scope of his agency the master is not liable⁴. A contract entered into by an agent by means of fraud or misrepresentation without the authority or knowledge of the principals is voidable as against them⁵. But "where by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property"⁶. The secretary of a company has no general authority to make representations to induce persons to take shares in a company; so a person who is induced to take shares in a company by a fraudulent misrepresentation, not authorised by or known to the officers of the company entitled to make representations, of the secretary of a company, is not entitled to maintain an action against the company for the rescission of the contract or for damages for such misrepresentation⁷. Where an employee obtains an information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained to the detriment of the employer. After the employee has left his master he may, unless restrained by contract, lawfully set up in the same line of business as his late master and in the same locality and may canvass for the custom of his late master's customers whose names and addresses he had obtained *bona fide* during the period of his service⁸. A servant, while yet in his master's employ, cannot canvass or solicit business from the master's customers for himself to take effect after he has left service⁹. A principal is bound by the contract of his agent but not by the representation of his agent, unless it be fraudulently made¹⁰. Where a contract is entered into fraudulently by an agent in the furtherance of his own interests, and contrary to the interests of the principal, the latter is bound by the contract only if the third person dealing with the agent acts in good faith. The burden of proving good faith lies on the third person claiming against the principal. As a general rule an agent has no authority to borrow money

3 *Weir v. Bell*, 47 LJ Ex 704, 706, *Sher Jan v. Alimuddi*, 23 CLJ 225, see cases *reftd.* to.

4 *Coleman v. Riches*, 24 LJCP 125.

5 *Refuge Assurance Co. v. Kettlewell*, 1909 AC 243; *Hughes v. Liverpool &c. Society*, (1916) 2 KB 482; (1916-17) All ER Rep 918.

6 *Rahim v. Chumi*, 173 IC 759; *Bowstead on Agency*.

7 *Newlands v. National E. A. Assocn.*, 54 LJQB 428, cited in *Diwan v. G. Sugar Mills* 173 IC 165.

8 *Robb v. Green*, (1895) 2 QB 1, on app 315; (1895-99) All ER Rep 1053; *Kirchner v. Gruban*, (1909) 1 Ch (1908-10) All ER Rep 242; 413; *Amber Size & Co. v. Menzel*, (1913) 2 Ch 239.

9 *Robb v. Green*, (1895) 2 QB 1; (1895-99) All ER Rep 1053; relied on in *Wessex Davies v. Smith*, (1935) 2 KB 80; (1935) All ER Rep 75.

10 *Cornfoot v. Fowke*, 6 M & W 358; *Bissessar v. Kabul*, 1945 N 121.

on account of the principal so as to render the latter responsible to the lender¹¹.

Where a lady on going to consult a solicitor was induced by his clerk and which had the effect of conveying some of her property to the clerk, to give him the deeds and to sign two documents which she did not read held, the solicitor was liable. "An innocent principal is civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud," though when *Barwick's case* was decided there was some difference of judicial opinion on this question. *Barwick v. English Joint Bank*¹² decided that a principal must be liable for the fraud of the agent committed in the course of his agent's employment, and not beyond the scope of his agency, whether the fraud be committed for the benefit of the principal or for the benefit of the agent¹³. It is not necessary, therefore, that the wrongful act of the agent should be for the master's benefit. It has been pointed out that there is a distinction drawn between "frauds committed by agents acting in the course of their business for their principals" and "frauds committed by agents in matters which do not fall within their authority." The question, therefore, in each case is whether a fraud was committed by the agent while acting in the course of his business for his principal. In *Gopal v. Secretary of State*¹⁴ it has been held that the principal is liable for the fraud of his servant in the course of his service and for the master's benefit. This case was decided upon a principle erroneously supposed to have been laid down in *Barwick's case*. The principle of law as enunciated in *Lloyd v. Grace Smith & Co.*¹⁵ is in accordance with the law as enacted in this section. There is nothing in this section to show that in order to render the principal liable the fraud must be committed for the benefit of the principal¹⁶. All persons directly concerned in the commission of a fraud are to be treated as principals, and they must not be permitted to excuse themselves on the ground that they acted as the agents or servants of others; for agents or servants ought not to join their masters or principals in the commission of a fraud and the contract of agency or service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud¹⁷.

A master is liable for the fraud of his servant committed in the course of his service and it is not necessary that any benefit should accrue to the master. A master is not liable for the misconduct of his servant committed for the servant's own private benefit¹⁸. When one of two innocent persons

11 *Bhagwanji v. Ganga*, 36 IC 968; *Hukumchand v. B. N. Ry.*, 45 IC 856; *Ram v. Hira*, 1942 AJ 341.

12 LR 2 Ex 259.

13 *Lloyd v. Grace Smith & Co.*, 1912 AC 716; (1911-13) All ER Rep 51; cited in *Kreditbank v. Schenkers*, (1927) 1 KB 826.

14 13 CWN 619.

15 1912 AC 716; (1911-13) All ER Rep 51.

16 *Dinabandhu v. Abdul*, 50 C 258; *Mathias v. K. A. Co-operative Bank*, (1938) 1 MLJ 241.

17 *Cullen v. Thomson's Trustees*, 4 Macq. 424; (1861-73) All ER Rep 640.

18 *Gopal v. Secretary of State*, 36 C 647, master not liable for misappropriation of proceeds of cheque by his servant.

must suffer from the wrongful act of a third person, the person who has placed him in a position of trust and confidence should suffer for his misdeeds if they are committed by the agent acting within the scope of his authority¹⁹. If an agent authorised to sell properties commits a fraud against his principal, the principal is the person who ought to suffer for the fraud of the agent²⁰. A principal is liable to third persons in a civil suit for the fraud and misfeasance of his agent in the course of his employment although the principal did not authorise, or justify, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. It is immaterial whether the fraud was committed for the benefit of the principal or for the benefit of the agent¹. Thus, where the secretary of the Mussoorie Municipality procured the issue of a warrant for a sum in excess of what was due from a person and the municipality adopted the act by receiving the amount realised from the sale of the plaintiff's property, the municipality was held liable². The master of a ship, signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed. The reason is that the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board³. A master by signing a bill of lading does not bind the owners regarding the particular mercantile quality of the goods put on board⁴. A company is not liable for a forged certificate issued by the company. The company is not estopped from disputing the genuineness of the certificate⁵. When an agent did not observe the terms of his contract with the principal, the agent would be liable for fraud, breaches of contract and defalcation⁶.

One agent is not responsible for the acts of another agent, unless he does something by which he makes himself a principal in the fraud. The persons responsible for fraud are of two classes. First, the actual perpetrators of the fraud, the authors of it, the agents who commit, the parties to it; secondly, the principal for whom an agent in the performance of his duties as agent commits the fraud is also responsible⁷. Payment of a sum by auditors is no discharge of the liability of a cashier for his defalcation as they are joint tortfeasors⁸. So also a railway company issuing a ticket to a passenger for a journey partly on the company's own line and partly on the line of another company presumably is responsible for the safety of the

19 *Sher Jan v. Alimuddi*, 43 C 511.

20 *Doorga v. Baney*, 7 C 199.

1 *Vardhman v. Radhakishan*, 79 IC 139.

2 *Municipal Board, Mussoorie v. Goodall*, 26 A 482.

3 *Grant v. Norway*, 20 LJCP 93. see as to the duty of shipmaster.

4 *Cox v. Bruce*, 18 QBD 147, 152.

5 *Ruben v. Fingall Consolidated*, 1906 AC 439 : (1904-07) All ER Rep 460; see *Whitechurch v. Cavanagh*, 1902 AC 117.

6 *Taylor v. U. Africa*, 1937 PC 78.

7 *Cargill v. Bower*, 10 Ch D 502, 513.

8 *L. & L. Ince v. Binoy*, 1945 C 218.

passenger on his whole journey and is liable to compensate of the passenger on his whole journey and is liable to compensate him for injuries caused to him by the negligence of railway servants or defective construction of carriages or stations to whichever company they belong⁹.

2. In the course of business.—The meaning of the words 'acting in the ordinary course of business' came up for determination in *Oppenheimer v. Attenborough*¹⁰. The court observed : "When you are dealing with a person who is a mercantile agent you have to find out whether in the customary course of his business as such agent he has authority to sell or consign for sale or buy or raise money on goods. There are many kinds of agents who receive possession of goods such, for instance, as carriers, and yet it is no part of the customary course of the business of such agents to sell them or consign them for sale or raise money on them. Therefore, when you are dealing with an agent in possession of goods, you have, no doubt, to consider what kind of agent he is, and what his customary course of business would be when he is acting in the capacity of agent."

3. Liability for criminal acts of agents.—The authorities make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute, in which case the principal is liable if the act is in fact done by the servants¹¹. The master is not liable where his servant for his own private ends does an unlawful act which the master did not authorise¹². The general rule of law is that a master is not criminally responsible for the acts of his servants unless he expressly commands or personally co-operates in them. In criminal cases they must answer for their own acts and stand or fall by their own behaviour. But there are exceptions to this general rule. Thus, in some cases criminal liability is imposed by statute upon the master as regards the acts or omissions of his servants. License cases form a class by themselves in which the master is generally held responsible. Statutes passed for the benefit of public health and sanitation are construed in the same way as Licensing Acts¹³. In *Attorney General v. Siddons*¹⁴ the rule is thus stated, "whatever a servant does in the course of his employment with which he is entrusted, and as a part of it, is the master's act." This rule which is of general application so far as civil liability goes is applicable to certain criminal proceedings also. Thus, a licensed vendor is liable on his servant selling opium in the course of his employment to a person below

⁹ *Foulkes v. M. D. Ry.*, 5 CPD 157, 168 ; *Thomas v. Rhymney Ry.*, LR 5 QB 226, on refce. LR 6 QB 266.

¹⁰ (1908) 1 KB 221, 226, 232.

¹¹ *Mounsell v. L. & N. Ry.*, (1917) 2 KB 836, cited in *Allen v. Whitethread*, (1930) 1 KB 211 ; (1929) All ER Rep 13.

¹² *Uma v. Secretary of State*, 18 Lah 380.

¹³ *Saiyyad Rahim v. Emperor*, 29 IC 325 ; *Emperor v. Zauar*, 45 A 541.

¹⁴ (1830) 1 Cr & J 220, 225.

14¹⁵. So also the master is liable for sale by his servant, acting under the general scope of his employment, of ammunition and military stores without previously ascertaining that the buyer was legally authorised to possess the same¹⁶. A Bank is liable for fraudulent misappropriation by its agent on crossed cheque¹⁷. If the offence is prohibited in itself knowledge on the part of the licensee (the principal) is immaterial¹⁸. A licensee is responsible for the default of his servants in permitting drunkenness in his shop without his knowledge¹⁹. An agent stealing the goods of the principal and selling them cannot confer a good title on the purchaser even though he bought them honestly²⁰. If a particular state of mind is not of the essence of an offence, the master may be criminally liable for the act of his servant done in the course of his employment¹.

15 *Emperor v. Babu Lal*, 34 A 319.

16 *Queen-Empress v. Tyab Ali*, 24 B 423.

17 *Carpenters' Co. v. B. M. Banking Co.*, (1938) 1 KB 511.

18 *Emray v. Nolloth*, (1903) 2 KB 264, a case of sale by a servant of intoxicating liquor to a child under 14.

19 *Shin Gyi v. Emperor*, 43 IC 81 (F.B.), fold in *Emperor, v. Gyaw* 44 IC 347, case under Burma Forest Act (IV of 1902).

20 *Farquharson v. King*, 1902 AC 325 : (1900-03) All ER Rep 120.

1 *Emp. v. Mangal*, 1934 R 182 ; see *Maung Ba v. Emp.*, 1934 R 245.

[CHAPTER XI: Section 239—266 : Of Partnership.]
Repealed, Act IX of 1932, s. 73 and Sch. II

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